

**IN THE MISSOURI SUPREME COURT**

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<b>ANDRE V. COLE,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC85830</b>
	)	
<b>STATE OF MISSOURI ,</b>	)	
	)	
<b>Respondent.</b>	)	

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Appeal from the Circuit Court of the County of St. Louis, Missouri  
Twenty-first Judicial Circuit, Division 9  
The Honorable David Lee Vincent, Judge

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**APPELLANT’S BRIEF**

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<sup>1</sup> The ABA guidelines can be found at

<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf>

### **JURISDICTIONAL STATEMENT**

Appellant, Andre Cole, was convicted after a jury trial in the Circuit Court of St. Louis County of one count of first degree murder, Section 565.020, RSMo, one count of first degree assault, Section 565.050, RSMo, two counts of armed criminal action, Section 571.015, RSMo, and one count of first degree burglary, Section 569.160, RSMo. On March 9, 2001, the court sentenced Cole to death for murder, life imprisonment for assault and armed criminal action, and thirty years for burglary.

Cole pursued a direct appeal. This Court affirmed the judgment and sentence and issued its mandate on April 23, 2002. Cole timely filed a *pro se* motion for post-conviction relief on July 22, 2002. Appointed counsel timely filed an amended motion on October 30, 2002. The motion court denied relief, after an evidentiary hearing, on December 29, 2003. Notice of Appeal was timely filed on January 29, 2004.

The punishment imposed in this case was death, therefore this Court has exclusive appellate jurisdiction. Article V, Section 3, Mo. Const. (as amended 1982).

## **STATEMENT OF FACTS**

In 1995, Andre and Terri Cole divorced after eleven years of marriage and having two sons together (Tr. 953-954, 1243-1244).<sup>2</sup> During 1997 and 1998, in an attempt to reconcile, they began seeing each other more frequently and spent weekends together (Tr. 964-965, 1195-1198, 1245). The relationship did not flourish, however, and Cole began dating another woman (Tr. 1253, 1387). Cole's sister, Mona Williams, informed Terri of this fact (Tr. 1198-1199).<sup>3</sup> Shortly thereafter, Terri changed her telephone number and refused to give the new number to Cole (Tr. 1005-1006, 1202, 1208, 1248-1249).

Between August 1994 and July 1998, Cole paid approximately \$12,000 in child support, but had an arrearage of just under \$3,000 (Tr. 1022). In the summer of 1998, Terri sought enforcement of the child support order issued during the

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<sup>2</sup> The record citations are referenced as follows: trial transcript (Tr.), direct appeal legal file (L.F.), post-conviction hearing transcript volume I (PCR Tr.) and volume II (PCR Tr. II), post-conviction relief legal file (PCR L.F.), supplemental post-conviction relief legal file (Supp. L.F.), and hearing exhibits (Ex.). Numbered exhibits were submitted by Movant, while lettered exhibits were submitted by Respondent.

<sup>3</sup> To avoid confusion, Andre Cole will be referred to as Cole, and other members of the Cole family will be referred to by their first names.

divorce, and Cole's wages were garnished (Tr. 847, 850, 949). A letter notifying Cole of the garnishment was mailed to him on July 31, 1998 (Tr. 1026-1027).

Pete Ruffino and Gene Kennedy, Cole's co-workers, observed that Cole was angry and frustrated about the amount of child support he was required to pay (Tr. 872, 881). They heard Cole say that he was going to kill his wife before he paid her any more money (Tr. 872, 881). Ruffino noticed that while normally Cole was an upbeat and cheerful person, when he spoke about his children he would get very depressed and quiet (PCR Tr. 7-8). Cole looked "as if he had reached the end of the line" (Ex. 2, p.21).

In August 1998, Cole made several unsuccessful attempts to contact his sons at Terri's house (Tr. 1254-1255). During this time, James Dawson, Cole's friend, helped him put an air conditioning unit in Cole's mother's house (PCR Tr. 33). Cole appeared drunk, and he was upset and frustrated (PCR Tr. 33-34). Cole told Dawson that Terri would not allow him to see his sons (PCR Tr. 34). Cole explained that Terri had told him that he did not have to worry about seeing his children, because the boys had a new daddy (PCR Tr. 34). Cole was hurt, and Dawson tried to reassure him that he would always be his sons' father (PCR Tr. 34-35).

Cole's mother, Lillie, observed signs of depression in Cole during this time (PCR Tr. II 21-24). He seemed "like he was going to snap or going to have a nervous breakdown" (PCR Tr. II 21). Cole was "terribly upset" and worried, because Terri would not let him see his sons (PCR Tr. II 21, 24-25). Lillie thought



Cole might be suicidal, because he told her, “you’re not going to see me any more. I just can’t take what’s going on” (PCR Tr. II 22, 24).

On the evening of August 21, 1998, Terri and a friend, Anthony Curtis, were at Terri’s house eating dinner and watching a movie (Tr. 911-913). Terri heard a crash from the dining room (Tr. 916). She went to investigate the noise and saw Cole entering the house through a shattered sliding glass door that opened onto a deck (Tr. 916-917). Cole yelled, “why are you doing this to me” and “I know that you love me” (Tr. 918).

Curtis told Cole to leave and opened the front door for him (Tr. 919). Cole attacked Curtis with a knife and stabbed him (Tr. 919). After Curtis fell to the living room floor and stopped moving, Cole attacked Terri and stabbed her (Tr. 920-922). Cole left the house through the sliding glass door (Tr. 927). Terri called 911, and the police and paramedics arrived a short time later (Tr. 639, 664, 927). The police found a large knife on the deck and a trail of blood drops on the deck, over a fence, and to a side street (Tr. 638-639, 755, 760-761, 786). Terri and her son, Marcus, had seen the knife, or one similar to it, at Cole’s house (Tr. 941, 1398). DNA testing established that the blood on the knife was consistent with Curtis’ and Terri’s DNA profiles, and the blood on the deck, fence, and street was consistent with Cole’s DNA profile (Tr. 1121, 1123-1127).

Terri suffered a total of twelve stab wounds to her back, arm, armpit, stomach and breasts (Tr. 923-924). She had emergency surgery and was hospitalized for about five days (Tr. 931-933). Curtis died as a result of the attack

(Tr. 702). An autopsy revealed that Curtis had thirteen slash wounds to his hands (Tr. 687-691, 700-701). These were defense wounds indicating that Curtis had tried to ward off the blows from the knife (Tr. 701). Curtis had seven stab wounds to his chest and back, one of which cut his aorta (Tr. 698-700). He had one stab wound to his scalp that penetrated the skull about one quarter of an inch (Tr. 700).

After stabbing Terri and Curtis, Cole fled the state (Tr. 1285). He eventually returned to St. Louis and approximately one month later turned himself in to the police (Tr. 1286). Cole was charged with murder in the first degree, assault in the first degree, burglary in the first degree, and two counts of armed criminal action (L.F. 13-15). Cole retained private counsel, Dorothy Hirzy (L.F. 1).

For the next two years and four months, Cole was incarcerated in the St. Louis County Justice Center awaiting trial (PCR Tr. 272). William Bradford, a unit supervisor, and Romel Cochrel, a housing unit officer, found Cole to be an ideal inmate who followed all jail rules and was an exceptional worker (PCR Tr. 273, 275, 285, 287). During this time, Cole took advantage of scripture classes taught by Sister Judith Klump and was an excellent student of the Bible (PCR Tr. 296). During jail visits, counsel noticed that Cole was depressed (PCR Tr. 441).

On defense counsel's motion, Cole underwent a pre-trial mental evaluation (L.F. 33-35, 37-38). Dr. Richard Scott assessed Cole's competency to stand trial and whether he was capable of knowing and appreciating the nature, quality, or wrongfulness of his conduct (L.F. 33-35, 37-38; Ex. A, B). Dr. Scott concluded

that Cole did not suffer from a mental disease or defect (Ex. A, p. 7; Ex. B, p. 4). Although Cole denied a history of alcohol problems, Dr. Scott diagnosed him with alcohol abuse (Ex. A, p. 4, 6). Cole was very hesitant to make a statement to Dr. Scott and said that he was not guilty several times during the interview (Ex. A, p.5; Ex. B, p. 3). Cole told Dr. Scott that at the time of the offenses his life was “going fine,” and he denied any history of psychiatric treatment (Ex. A, p. 4; Ex. B, p. 3).

Dr. Scott noted that the number of wounds to Curtis could “suggest a clear intent to cause death or may reflect a frenzied, out-of-control attack” (Ex. B, p. 5). Dr. Scott also noted that “[d]uring the alleged attack, the defendant reportedly questioned [Terri], asking her why she would do this to him and repeatedly stating that he loved her. Such statements in the context of their off-and-on relationship suggest that he was reacting out of anger, rejection, and/or hurt” (Ex. B, p. 6).

Counsel sought a second mental evaluation by Dr. Michael Armour, who also evaluated Cole’s competency and criminal responsibility (Supp. L.F. 1; Ex. C). Dr. Armour concluded that Cole did not suffer from a mental disease or defect (Ex. C, p. 9). Cole told Dr. Armour that he had repeatedly tried to contact his children but was unable to do so (Ex. C, p. 2-3). Cole admitted that he broke the glass patio door (Ex. C, p. 3). Cole said that a man charged him and struck him (Ex. C, p. 3). Cole said that Terri was behind the man, and although he did not know what happened, he believed Terri struck the man with a knife (Ex. C, p. 3). According to Dr. Armour’s report, “When asked how his ex-wife had suffered stab

wounds, Mr. Cole stated that he will say that he did not touch his ex-wife and did not stab the deceased victim in the back” (Ex. C, p. 3).

Trial began on January 9, 2001 (Tr. 27). The guilt phase theory of defense was that Cole went to Terri’s house and broke her patio door, but did not stab Curtis or Terri (Tr. 599, 603, 1461). Counsel implied that Terri had stabbed Curtis (Tr. 1441, 1447-1448).

Cole testified that in August 1998 he tried to contact Terri and his sons several times but was unsuccessful (Tr. 1254-1255, 1258-1259). Cole said that he was bothered by the garnishment of his wages, because Terri had agreed to give him time to make the payments, because they had been seeing each other, and because Cole had recently purchased a house (Tr. 1251-1252). Cole denied telling any co-workers that he was going to kill Terri (Tr. 1255, 1319).

Cole explained that on the evening of August 21, 1998, he went to Terri’s house after he got off work, but no one answered the door (Tr. 1265). He went home and then went to several stores shopping for a satellite system (Tr. 1260). He also went to his sister’s house for a visit (Tr. 1262-1263). Cole drove by Terri’s house and noticed a light on in the back of the house (Tr. 1264). Cole was tired of Terri not responding to his efforts to contact her, so to get her attention he threw a car jack through the sliding door (Tr. 1266-1268).

Cole testified that he started to enter the house when a man he had never seen before came towards him (Tr. 1269). Cole stepped out of the house and stood on the deck (Tr. 1269). He did not have a weapon (Tr. 1269-1270). The

man, Curtis, struck Cole on his leg with a knife (Tr. 1270). Cole grabbed Curtis' arm (Tr. 1270, 1272). Cole saw Terri standing behind Curtis (Tr. 1272). Cole saw Terri raise her arm, and he saw an expression of pain on Curtis' face (Tr. 1272, 1275-1276). Curtis still had the knife in his hands (Tr. 1276).

Curtis jerked away from Cole and walked towards Terri, who was backing up towards the living room (Tr. 1273-1274). Curtis and Terri were "swinging" at each other, but Cole did not actually see Curtis hit Terri (Tr. 1273-1274). While Curtis and Terri were in the house, Cole called his mother and sister and told them that something bad had happened (Tr. 1278). He did not call the police, because he had "problems with St. Louis County from prior situations," and he thought they might blame him for what happened (Tr. 1277).

Cole testified that Terri came out of the living room and said that she had been stabbed (Tr. 1278-1279). Cole told Terri to come with him; he intended to take her to a hospital (Tr. 1279). Terri refused and told Cole to leave (Tr. 1279). Cole ran to his car and drove home (Tr. 1279-1280). He bandaged his leg and changed clothes (Tr. 1280). Cole drove around the St. Louis area for a while and then spent the night at a motel (Tr. 1281-1284). He drove to Tennessee and stayed with relatives for a week and a half (Tr. 1285). While in Tennessee, he disposed of the clothes he had been wearing at the time of the stabbings (Tr. 1320-1321). Cole returned to St. Louis and stayed in a motel and went to his house at night (Tr. 1284-1285). Cole eventually contacted an attorney and made arrangements to turn himself in to the police (Tr. 1287-1289).

The prosecutor began the first portion of his closing argument by saying:

. . . ladies and gentleman of the jury, I want to thank you for your time because this is one January 15<sup>th</sup> of 2001 and you're spending it here with us and just like you spent the last week you are giving us a most valuable asset, however, **I can't think of a case that could be more important to the people of St. Louis County** and to the family of Anthony Curtis and to the family of Terri Cole and Terri Cole herself and [sic] the case that you've heard here over the last week.

(Tr. 1415)(emphasis added).

During closing argument for the defense, counsel said, “. . . he took the stand and he told you his side of the story. Now, the state wants you to think it's ludicrous because he's been charged, he's therefore guilty” (Tr. 1450). The prosecutor objected, “I have never said that. That misstates the law, misstates what I told the jury during the entire jury selection in the case” (Tr. 1450-1451). The court sustained the state's objection (Tr. 1451).

During the rebuttal portion of the state's closing argument, the prosecutor made the following statements:

What we do know is his actions are deliberate. When she says it's ludicrous, maybe it is to you and me. To him it's deliberate. He's not an imbecile but he's not a rocket scientist. **People sitting in that chair (indicating), ladies and gentlemen, are usually there for a**

**reason.** They may not be a rocket scientist, they are deliberate and calculating and do the best they can with the mayhem they create.

(Tr. 1474)(emphasis added).

\* \* \*

Do not forget that he lied when you look at this case. Don't think somebody who killed wouldn't come in and lie. I'm going to ask you to think about two worlds have collided. Anthony Curtis, a tour guide from the museum. You can take that picture of Terri Cole. It shows her after the attack. She's Marcus' mom. She's Anthony's mom. She's a mom who worked for a health company doing clerical work and **he's a convicted killer.**

(Tr. 1478)(emphasis added).

\* \* \*

I'll ask you this: if not him, who? If not now, when? **Don't tell Terri Cole, a dying woman, by your verdict that she is a liar.**<sup>4</sup> You give the Curtis family and Anthony Curtis the justice they deserve. You give Terri Cole and her family the justice that they deserve and you give that cold-blooded killer sitting right across the

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<sup>4</sup> At the time of trial, Terri had been diagnosed with ALS, Lou Gehrig's disease (Tr. 910). Terri did not suffer from this illness at the time of the stabbings (Tr. 910).

table looking at you, exactly what he deserves. You hold him fully accountable.

(Tr. 1479-1480)(emphasis added).

Counsel did not object to the above arguments by the prosecutor (Tr. 1415, 1474, 1478, 1480).

The state submitted instructions on first degree murder and second degree murder (L.F. 154-155). The jury deliberated for five hours and fifteen minutes and returned verdicts of guilty on all counts as charged (Tr. 1481, 1492; L.F. 167-171).

The state's penalty phase evidence and argument focused on prior acts of violence committed by Cole against Terri (Tr. 1514-1517, 1539-1541, 1543-1550, 1556-1568, 1634-1636, 1639-1640). The state's case included evidence that: 1) Terri obtained restraining orders against Cole; 2) in August 1994, Cole confronted Terri in her home and ripped two phones from the wall; 3) in November 1994, Cole punched Terri's car windshield, breaking the glass; and 4) in October 1995, Cole broke into Terri's house by throwing a tire tool through her patio door and then confronted her with a gun (Tr. 1514-1517, 1539-1541, 1543-1550, 1556-1568). The state also presented the testimony of Curtis' sister, brother-in-law, and mother, who described how much they loved and missed Curtis (Tr. 1588-1594).

The defense presented ten witnesses - friends and family - who testified that Cole was dependable, helpful, a good father, son, and brother, good at sports, a



hard worker, and he attended church regularly (Tr. 1596-1597, 1600-1601, 1607, 1610-1611, 1613, 1618-1619, 1627).

During the state's penalty phase argument, the prosecutor argued for imposition of the death penalty, without objection by counsel, saying:

. . . you all told me you could consider it and give it realistic consideration after you've heard all the evidence, and that's what I'm asking you to do now. I'm not trying to tell you this is easy. I'm not telling you it's going to be nice. **But I'll tell you there have always been times in our society when citizens, patriots, from time to time have stepped up and done the things that need to be done to protect society.**

(Tr. 1654)(emphasis added).

The jury deliberated for about three hours and twenty minutes and returned a death verdict (Tr. 1656-1658). On March 9, 2001, the court sentenced Cole to consecutive terms of death for murder, life imprisonment for assault and armed criminal action, and thirty years for burglary (Tr. 1672, 1686).

Cole timely pursued a direct appeal to this Court (L.F. 218-219). This Court affirmed the judgment and sentence. State v. Cole, 71 S.W.3d 163 (Mo. banc 2002). This Court issued its mandate on April 23, 2002 (PCR L.F. 7). Cole timely filed a *pro se* motion for post-conviction relief on July 22, 2002 (PCR L.F. 6).

As part of the post-conviction proceedings, Cole was examined by Dr. William Logan, a psychiatrist (PCR Tr. 76, 82; Ex. 2, p.1). Dr. Logan reviewed numerous records regarding Cole and his family, including the trial transcript, police reports, medical records, employment records, financial records, educational records, legal records, including those regarding Cole's divorce, and numerous interview notes (PCR Tr. 86-87; Ex. 3).

Dr. Logan discovered a strong family history of alcohol abuse and mood disorders (PCR Tr. 101-102; Ex. 2, p. 2-5). Cole's father and paternal grandfather had severe drinking problems and were medically treated for life-threatening consequences of alcohol abuse (PCR Tr. 101). Numerous other relatives also abused alcohol (PCR Tr. 101-102; Ex. 2, p. 3-4).

Dr. Logan found evidence of alcohol abuse and mood disorders on Lillie Cole's side of the family as well (PCR Tr. 101-102, 117-118; Ex. 2, p. 4). Lillie's brother committed suicide during a domestic situation, and Lillie's mother was bedridden with depression for over a year following the death of Lillie's father (PCR Tr. 118). The presence of mood disorders and alcohol abuse in Cole's family history created an increased likelihood that Cole would suffer from those problems (PCR Tr. 102, 123-124; Ex. 2, p. 5).

Dr. Logan concluded that a number of stressful events contributed to the demise of Cole's and Terri's marriage (PCR Tr. 125). These events included the births of their sons, the death of Cole's father, financial problems, and the fact that arguments between the two had escalated to physical confrontations (PCR Tr. 125-

132; Ex. 2, p. 8-12). Dr. Logan concluded that Cole experienced “a prolonged period of multiple intense major life stressors” following his separation and divorce from Terri (Ex. 2, p. 18-19). Cole initiated a series of altercations with Terri which resulted in convictions for unlawful use of a weapon and violating an order of protection (PCR Tr. 133, 136-137; Ex. 2, p. 14-18). Cole was treated by Dr. Fred Duhart for anxiety and depression (PCR Tr. 133, 136; Ex. 2, p. 15-17).

Despite all this turmoil, in late 1997 and into 1998, Cole and Terri “were getting along” and began seeing each other more frequently and spent weekends together (Tr. 964-965, 1195-1198, 1245). But when Terri suddenly cut off contact with Cole for reasons unknown to him, Cole became depressed (Ex. 2, p. 24-25). Cole reported to Dr. Logan that he felt depressed, anxious, and hopeless, lost sleep, and had suicidal thoughts (PCR Tr. 144; Ex. 2, p. 22, 25).

Cole told Dr. Logan that on the evening of the stabbings he had gone by Terri’s house several times, but no one was home (PCR Tr. 145; Ex. 2, p. 27). He returned later and saw a light on at the back of the house (PCR Tr. 146; Ex. 2, p. 27). He took a tire jack, because he planned to break the glass patio door (PCR Tr. 146; Ex. 2, p. 27). He knew that Terri had an alarm system and that the police would probably be called, but he was desperate to confront her about why she had cut off contact with him (PCR Tr. 146; Ex. 2, p. 27).

Cole broke the glass and saw Curtis approaching him (PCR Tr. 147; Ex. 2, p. 27). He saw Curtis reach for a knife, and the two men struggled (PCR Tr. 147; Ex. 2, p. 28). Cole was cut, and he “snapped” (Ex. 2, p. 28). Cole could not

remember what happened after that, except he recalled Terri holding her breast and saying that she had been cut (PCR Tr. 147; Ex. 2, p.28).

Dr. Logan diagnosed Cole with major depression, single episode, mild to moderate severity (PCR Tr. 90; Ex. 2, p. 30). Dr. Logan concluded to a reasonable degree of medical certainty that at the time of the offenses, Cole was under the influence of extreme emotional disturbance due to his degree of depression and obsession with the issue of separation from his sons and the need to contact Terri (PCR Tr. 147; Ex. 2, p. 35).

Appointed counsel timely filed an amended motion on October 30, 2002 (PCR L.F. 17). The amended motion asserted that counsel rendered ineffective assistance by: 1) failing to object to improper portions of the state's closing argument; 2) failing to investigate and present the testimony of William Bradford, Romel Cochrel, and Sister Judith Klump regarding Cole's good adjustment to jail; 3) failing to investigate and present evidence regarding Cole's mental state at the time of the offenses through the testimony of a psychiatrist, such as Dr. Logan, who would have established the statutory mitigating circumstance of extreme emotional disturbance; and 4) failing to investigate and present evidence of Cole's mental state at the time of the offenses through the testimony of Pete Ruffino, James Dawson, Dr. Fred Duhart, and Lillie Cole (PCR L.F. 35-42, 44-48, 50-51, 58-133, 192-198, 217, 246-250, 267-274, 278-281, 284, 285, 286-289, 323-325, 330-331, 338-340).

The motion court granted an evidentiary hearing (PCR L.F. 444-445). Cole presented the testimony of Dr. Logan, Ruffino, Dawson, Dr. Duhart, Lillie Cole, Bradford, Cochrel, Sister Klump, Dr. Armour, Dr. Scott, and defense counsel, Dorothy Hirzy (PCR Tr. 5, 22, 75, 271, 282, 294, 307, 326; PCR Tr. II 5, 57, 74, 90). The state submitted the reports of Dr. Scott and Dr. Armour (PCR Tr. 194). On December 29, 2003, the motion court denied Cole's claims for post-conviction relief (PCR L.F. 450-486). Notice of Appeal was timely filed on January 29, 2004 (PCR L.F. 489).

## **POINT I**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to object during guilt phase when the prosecutor argued that: 1) he could not think of a case more important to the people of St. Louis County; 2) Cole was a convicted killer; 3) people charged with crimes are charged for a reason; and 4) a not guilty verdict would tell Terri Cole, a dying woman, that she was a liar; and counsel also failed to object during penalty phase when the prosecutor argued that the jurors needed to be good citizens and patriots and impose the death penalty. Cole was prejudiced, because there is a reasonable probability that the outcome of the guilt and penalty phases would have been different had counsel objected.**

State v. Evans, 820 S.W.2d 545 (Mo. App. E.D. 1992);

State v. Ross, 667 S.W.2d 31 (Mo. App. E.D. 1984);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992).

## **POINT II**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to investigate and present mitigating evidence of Cole's favorable adjustment to incarceration through readily available witnesses, including: 1) William Bradford, who would have testified that Cole was an ideal inmate who followed all the jail rules; 2) Romel Cochrel, who would have testified that Cole was an exceptional worker who was quite different from most inmates and who made Cochrel's job easier; and 3) Sister Judith Klump, who would have testified that Cole was an excellent Bible student and a leader among the inmates. There is a reasonable probability that the jury would have recommended life imprisonment if defense counsel had presented this evidence.**

**Skipper v. South Carolina**, 106 S.Ct. 1669 (1986);

**Wiggins v. Smith**, 123 S.Ct. 2527 (2003);

**Williams v. Taylor**, 120 S.Ct. 1495 (2000);

**Hall v. Washington**, 106 F.3d 742 (7<sup>th</sup> Cir. 1997).

### **POINT III**

**The motion court clearly erred in denying Cole’s motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to investigate and present mitigating evidence of Cole’s mental state through a psychiatrist, such as Dr. William Logan, who would have testified that at the time of the offenses Cole was under the influence of an extreme emotional disturbance, due to major depression caused by obsession with the separation from his ex-wife and sons, alcohol abuse, and a genetic predisposition to mood disorders and alcohol abuse. Cole was prejudiced, because this testimony would have established the statutory mitigating circumstance of extreme mental or emotional disturbance, and there is a reasonable probability that the jury would have imposed a sentence of life without parole if it had heard this testimony.**

Kenley v. Armontrout, 937 F.2d 1298 (8<sup>th</sup> Cir. 1991);

Carter v. Bell, 218 F.3d 581 (6<sup>th</sup> Cir. 2000);

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

ABA Guidelines for the Appointment and Performance of Counsel in Death

Penalty Cases (2003).



#### **POINT IV**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to investigate and present mitigating evidence of Cole's mental state through readily available witnesses, including: 1) Pete Ruffino, who would have testified that Cole, who was normally upbeat and cheerful, became depressed when he spoke of his children and was very depressed and not himself shortly before the stabbings; 2) James Dawson, who would have testified that about two weeks before the stabbings Cole was upset, drunk, and frustrated, because Terri would not let him see his children, and because she had said that the children had a new daddy; 3) Dr. Fred Duhart, who would have testified that he treated Cole for anxiety and depression, and that he treated Cole's father for severe alcoholism and hallucinations; and 4) Lillie Cole, who would have testified about her husband's alcoholism, the family history for alcoholism and mood disorders, and how depressed Cole was before the stabbings. Cole was prejudiced, because a reasonable probability exists that the jury would have imposed a life sentence if the jury had heard this mitigating evidence.**

**Cheshire v. State, 568 So.2d 908 (Fla. 1990);**

Wiggins v. Smith, 123 S.Ct. 2527 (2003).

## **ARGUMENT I**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to object during guilt phase when the prosecutor argued that: 1) he could not think of a case more important to the people of St. Louis County; 2) Cole was a convicted killer; 3) people charged with crimes are charged for a reason; and 4) a not guilty verdict would tell Terri Cole, a dying woman, that she was a liar; and counsel also failed to object during penalty phase when the prosecutor argued that the jurors needed to be good citizens and patriots and impose the death penalty. Cole was prejudiced, because there is a reasonable probability that the outcome of the guilt and penalty phases would have been different had counsel objected.**

Counsel rendered ineffective assistance when she failed to object to improper guilt and penalty phase closing arguments. Counsel failed to object to four improper portions of the state's guilt phase closing argument. The prosecutor's improper arguments were: 1) claiming that he could not think of a more important case in the county, 2) referring to Cole as a convicted killer, 3)

stating that people charged with crimes are usually guilty of those crimes, and 4) emotionally appealing to the jury by referring to Terri as a dying woman. Counsel also failed to object during penalty phase when the prosecutor argued that the jurors needed to be good citizens and patriots and impose the death penalty. A reasonably competent attorney would have objected to each of these arguments. Cole was prejudiced by counsel's failure to object, because the jury's consideration of the improper arguments undermines confidence in the jury's determination of guilt and their recommendation of a death sentence.

To establish that counsel was ineffective, a movant must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). The benchmark for judging whether counsel was ineffective is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. To establish deficient performance, a movant must identify specific acts or omissions that were "outside the wide range of professional competent assistance." Id. at 2066.

To establish prejudice, a movant must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A conviction can be

rendered unreliable and unfair, even if errors made by counsel cannot be shown to have determined the outcome. Id.

On direct appeal, Cole claimed that the trial court plainly erred in allowing the prosecuting attorney to make each of the guilt phase arguments challenged in this point. State v. Cole, 71 S.W.3d 163, 170 (Mo. banc 2002). As to each, with the exception of the prosecutor's reference to Cole as a "convicted killer," this Court said, "finding no error of law an extended opinion on these issues would have no precedential value." Id. As to the prosecutor's reference to Cole as a "convicted killer," this Court addressed the issue but declined to find plain error. Id. at 170-171. Because Strickland prejudice is not an outcome determinative test, a finding on direct appeal of no plain error by the trial court does not preclude post-conviction relief. Deck v. State, 68 S.W.3d 418, 427 (Mo. banc 2002).

Appellate review of a motion court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo. banc 1991).

The motion court applied an incorrect standard of review, stating that "claims raised and determined adversely to an appellant on direct appeal may not be relitigated by attempting to transform the claim into a claim of ineffective assistance of counsel" (PCR L.F. 453). In Deck, 68 S.W.3d at 427, this Court

explicitly overruled two of the cases the motion court relied on in support of this proposition, State v. Suter, 931 S.W.2d 856 (Mo. App. 1996) and State v. Chapman, 936 S.W.2d 135 (Mo. App. 1996)(PCR L.F. 453).

### **Guilt Phase Arguments**

#### **Most Important Case in the County**

At the outset of his guilt phase closing, the prosecutor argued:

. . . ladies and gentleman of the jury, I want to thank you for your time because this is one January 15<sup>th</sup> of 2001 and you're spending it here with us and just like you spent the last week you are giving us a most valuable asset, however, **I can't think of a case that could be more important to the people of St. Louis County** and to the family of Anthony Curtis and to the family of Terri Cole and Terri Cole herself and [sic] the case that you've heard here over the last week.

(Tr. 1415)(emphasis added).

Counsel testified that she did not remember whether she made a conscious decision not to object to this argument (PCR Tr. 344). She said she did not have a strategic reason for not objecting to the argument, although she did not believe the argument implied that the prosecutor had special knowledge that this was the single most important case in the county (PCR Tr. 338). Counsel stated that this argument was a common tactic used by prosecutors (PCR Tr. 336).

The motion court denied relief on this claim, because the argument was made in the context of thanking the jurors for their time spent hearing the case and was expressing to the jury “that they have an important job before them and that their time as jurors is an important component to the justice system in St. Louis County” (PCR L.F. 456). The court observed that this Court found no error concerning these remarks and concluded that an objection by defense counsel would have been without merit (PCR L.F. 456).

The motion court clearly erred, because this argument did not merely thank the jurors for performing an important civic duty. This argument was improper, because it explicitly told the jury that the prosecutor believed that Cole’s prosecution was the single most important case in the county. The statement implied that the prosecutor was aware of all other prosecutions from that county, and that those other cases paled in comparison to Cole’s case. The argument also implied that the prosecutor, with all of his experience in criminal matters, could not even conceive of a case as important.

This Court condemned a similar argument in State v. Storey, 901 S.W.2d 886, 900-901 (Mo. banc 1995). During the penalty phase, the prosecutor improperly argued, “this case is about the most brutal slaying in the history of this county.” Id. A prosecutor may not argue facts outside the record, because such arguments amount to unsworn testimony by the prosecutor. Id. A prosecutor’s assertions of personal knowledge are highly prejudicial, because they are apt to

carry great weight with the jury, since the jury knows the prosecutor has a duty to serve justice. Id. at 901.

Counsel was familiar with State v. Storey, because she represented Mr. Storey and was found to have rendered ineffective assistance for not objecting to the improper closing argument (PCR Tr. 338-339). Counsel did not find Storey applicable here, because the prosecutor in Storey “really went to town,” and because the cases were “done under different circumstances” (PCR Tr. 343).

Federal courts have granted new trials because of improper penalty phase closing arguments, finding both Eighth Amendment and Fourteenth Amendment due process violations. Newlon v. Armontrout, 885 F.2d 1328, 1337-1339 (8th Cir. 1989)(among other improper remarks, prosecutor argued that he had never seen a man who deserved the death penalty more than the defendant); Copeland v. Washington, 232 F.3d 969, 975 (8<sup>th</sup> Cir. 2000)(prosecutor improperly argued that “there has never, ever been a more complete and utter disregard for the sanctity of human life as this case”); also see, Antwine v. Delo, 54 F.3d 1357, 1364 (8th Cir. 1995)(prosecutor improperly argued facts outside the record and diminished the jury’s sense of responsibility for imposing death by arguing that execution in a gas chamber would be instantaneous).

Counsel was ineffective for failing to object to this argument, which she knew to be improper from her experience in Storey. A reasonably competent attorney would not have allowed the prosecutor to inject his personal opinion that Cole’s case was the single most important case to the people of St. Louis County.



### **He's A Convicted Killer**

The prosecutor made the following statement in rebuttal argument:

Do not forget that he lied when you look at this case. Don't think somebody who killed wouldn't come in and lie. I'm going to ask you to think about two worlds have collided. Anthony Curtis, a tour guide from the museum. You can take that picture of Terri Cole. It shows her after the attack. She's Marcus' mom. She's Anthony's mom. She's a mom who worked for a health company doing clerical work and **he's a convicted killer.**

(Tr. 1478)(emphasis added).

On direct appeal, this Court reviewed the propriety of this argument for plain error. 71 S.W.3d at 170-171. This Court wrote:

The prosecutor's statements referencing Appellant's prior convictions were properly admitted to attack the Appellant's credibility. The misstatement by the prosecutor referring to the Appellant as a 'convicted killer' was a single inadvertent remark not prejudicing Appellant because the jury had already been presented with the precise nature of his actual prior convictions, none of which involved a homicide. Statements made in closing argument will rarely amount to plain error, and any assertion that the trial court erred for failure to intervene sua sponte overlooks the fact that the

absence of an objection by trial counsel may have been strategic in nature.

Id.

Counsel did not have a strategic reason for not objecting to this argument. Counsel testified that she had no recollection of this argument being made, but she believed it was objectionable, because it misstated the facts (PCR Tr. 329, 479-480). At the time of trial, Cole had never been convicted of any homicide (PCR Tr. 330). Counsel said she would have objected if she had heard the argument (PCR Tr. 330). Counsel admitted that she did not have a strategic reason for not objecting (PCR Tr. 330). She speculated that she did not hear the argument, because Cole was talking to her at the time (PCR Tr. 330).

The motion court found that the argument reflected the prosecutor's efforts to contrast the witnesses' credibility, not an attempt to imply that Cole had committed a prior murder (PCR L.F. 455). The motion court agreed with this Court's finding that the remark was inadvertent and did not prejudice Cole (PCR L.F. 455). The motion court also found that "trial counsel indicated that had she heard the remark she may or may not have objected to it" (PCR L.F. 455). That finding is clearly erroneous, because counsel testified that the argument was objectionable, and, had she heard it, she would have objected to the misstatement (PCR Tr. 329-330, 479-480).

It is improper for a prosecutor to misstate evidence or argue facts not in evidence. State v. Ferguson, 20 S.W.3d 485, 502-503 (Mo. banc 2000)(prosecutor

misstated the evidence during penalty phase argument when he said the defendant choked and beat other women, because the evidence established that defendant had choked and beat one woman, but the error did not rise to the level of plain error); State v. Pride, 567 S.W.2d 426, 434 (Mo. App. 1978)(it was inaccurate to argue that it took four rather than two police cars to apprehend the defendant, but the comment was not prejudicial); United States v. Achtenberg, 459 F.2d 91, 98 (8<sup>th</sup> Cir. 1972)(where defendant was accused of destroying property, it was reversible error for the prosecutor to argue that defendant was overheard to say “let’s destroy the building,” where there was no such evidence).

Cole did not have any prior homicide convictions, thus the prosecutor misstated the facts in referring to Cole as a convicted killer. The trial court would have sustained an objection by counsel had she made one. Counsel was ineffective for failing to object.

### **People are Charged With Crimes for a Reason**

During the defense closing argument, counsel said, “. . . he took the stand and he told you his side of the story. Now, the state wants you to think it’s ludicrous because he’s been charged, he’s therefore guilty” (Tr. 1450). The prosecutor objected, “I have never said that. That misstates the law, misstates what I told the jury during the entire jury selection in the case” (Tr. 1450-1451). The court sustained the state’s objection (Tr. 1451).

During his rebuttal, the prosecutor argued:

What we do know is his actions are deliberate. When she says it's ludicrous, maybe it is to you and me. To him it's deliberate. He's not an imbecile but he's not a rocket scientist. **People sitting in that chair (indicating), ladies and gentlemen, are usually there for a reason.** They may not be a rocket scientist, they are deliberate and calculating and do the best they can with the mayhem they create.

(Tr. 1474)(emphasis added).

Counsel testified that the prosecutor's argument was retaliatory to her argument, and, while the argument "maybe was a little too far," she did not think it was objectionable, although she did not have a specific recollection as to why she did not object (PCR Tr. 349-350, 352-354). The motion court concluded that the state's retaliatory argument was proper, and that "the State addressed Movant's intelligence and ability to commit this crime, not the presumption of innocence" (PCR L.F. 458).

The motion court's conclusions are clearly erroneous. The prosecutor's argument that people in Cole's position are usually there for a reason improperly denigrated the presumption of innocence and implied to the jury that the prosecutor had knowledge of Cole's guilt beyond the facts in evidence. The argument implied that people charged with crimes are usually guilty of those crimes.

In United States v. Splain, the prosecutor argued that the United States Attorney's Office was not picking on the defendant, rather the office was trying to

convict him, “because he committed a crime and we are convinced of that or we wouldn’t be trying him.” 545 F.2d 1131, 1134 (8<sup>th</sup> Cir. 1976). The United States Court of Appeals, Eighth Circuit condemned the argument:

Statements such as this have no place in a criminal trial. It is a fundamental principle in our jurisprudence that a man is presumed innocent until proven guilty by a jury of his peers. The question of guilt or innocence rests with the jury and the prosecutor has no authority to sit as a ‘thirteenth juror’ and cast a ballot on this issue.

Id. The Splain court reviewed for plain error and determined that, because of overwhelming evidence of guilt, there was no miscarriage of justice. Id. at 1136.

Even if the prosecutor’s argument was provoked by counsel’s comment in closing, the improper argument cannot be sanctioned as mere retaliation. In State v. Evans, the defense argued that the state had a vested interest in the defendant’s conviction. 820 S.W.2d 545, 547 (Mo. App. E.D. 1992). The prosecutor retaliated by arguing that he would not have charged the defendant if he were innocent. Id. Defense counsel objected, and the trial court sustained the objection and instructed the jury to disregard the remark, but refused to grant a mistrial. Id. The Court of Appeals reversed, holding:

There are limits as to how far the prosecutor can go in retaliation. It is improper for the prosecutor to express his belief of a defendant’s guilt to the jury in such a way that it implies knowledge on his part of facts not in evidence pointing to the Defendant’s guilt. The

problem with such an argument is that it does not seek a verdict based on proof of guilt of the accused, but instead rests as an expression of confidence in a prosecutorial system which does not bring innocent persons to trial. This appeal to the jury is a pernicious attack upon fundamental concepts of the criminal justice system and exceeds the bounds of legitimate comment on the evidence.

Id. at 547-548 (citations omitted).

In State v. Jones, the defense argued that it was the prosecutor's job to win cases. 835 S.W.2d 376, 378 (Mo. App. E.D. 1992). In response, the prosecutor argued that his job was to obtain justice. Id. at 379. Defense counsel objected, and the court overruled. Id. The prosecutor continued his argument, stating that he did not prosecute cases unless he was certain the defendant was guilty. Id. Defense counsel objected, and the court sustained and instructed the jury to disregard the argument. Id. The court denied defense counsel's request for a mistrial. Id.

On appeal, the court recognized Evans and the principle that there are limits as to how far a prosecuting attorney can go in retaliation. Id. But, because the issue had not been raised in the defendant's motion for new trial, the court was limited to plain error review. Id. The court declined to reverse, finding that the argument did not have a decisive effect on the jury and no manifest injustice resulted from denying a mistrial. Id. at 380.

In State v. Ross, the defense argued that two state witnesses' in-court identifications of the defendant were the product of unduly suggestive line-ups, not the witnesses' independent memories of the alleged crime. 667 S.W.2d 31, 32-33 (Mo. App. E.D. 1984). In retaliation, the prosecutor said, "[defense counsel] implies that there's some unfairness about these lineups. That this man was some how denied his rights when this lineup took place. . . . If this man had been denied one single right that was available to him when this took place you would not be allowed to see these or consider that evidence." Id. at 33. Defense counsel objected, but the trial court overruled. Id.

The appellate court found the state's argument improper, because it told the jury that the method of identification had been judicially sanctioned. Id. The court recognized the general rule that retaliatory remarks will not support a claim of error, but concluded that the state's argument went far beyond retaliation, because it attempted to erroneously instruct the jury on the law. Id. The court found the error prejudicial, because the assailant's identity was the only issue at trial, and it was impossible to conclude that the argument had not influenced the jury. Id.

In this case, the prosecutor's argument was improper and cannot be dismissed as fair retaliation. When counsel argued that the prosecutor wanted the jury to think Cole was guilty because he was charged, the prosecutor objected, within the jury's hearing, that the argument was a misstatement of the law, and the court sustained the objection (Tr. 1450-1451). At that point, the prosecutor

received the remedy to which he was entitled, and the matter should have ended. Instead, the prosecutor deliberately chose to misstate the law; he was not “righting a wrong.”

### **Referring to Terri Cole as A Dying Woman**

At the time of trial, Terri had been diagnosed with ALS, Lou Gehrig’s disease (Tr. 910). Terri did not suffer from this illness at the time of the stabbings (Tr. 910). She was in a wheelchair and had to be helped to the witness stand (PCR Tr. 361-362). Counsel recalled that Terri was seated when the jury was not present (PCR Tr. 473).

During his rebuttal closing argument, the prosecutor said:

I’ll ask you this: if not him, who? If not now, when? **Don’t tell Terri Cole, a dying woman, by your verdict that she is a liar.** You give the Curtis family and Anthony Curtis the justice they deserve. You give Terri Cole and her family the justice that they deserve and you give that cold-blooded killer sitting right across the table looking at you, exactly what he deserves. You hold him fully accountable.

(Tr. 1479-1480)(emphasis added).

Counsel testified that she specifically recalled this argument (PCR Tr. 359). She said that she did not like it, but did not object, “because it would have appeared to the jury that I was as coldhearted as I could possibly be” (PCR Tr. 359). Counsel’s excuse for not objecting is not reasonable trial strategy. It strains



credulity to suggest that a single objection would have turned the jury against counsel after counsel had just spent approximately forty-five minutes arguing that Terri killed Curtis and pinned the crime on Cole (Tr. 1441, 1443-1444, 1447-1448, 1452-1453, 1457-1458, 1462).<sup>5</sup> Counsel argued that Terri turned her sons against their father, that there was a reason Terri was baptized after the offenses, and that Terri called people immediately after the stabbings to get her story out, because “she doesn’t care what she has to say to make him die” (Tr. 1444, 1446, 1452-1453, 1462). An objection to the prosecutor’s improper appeal for the jury’s sympathy would not have tarnished counsel in the jury’s eyes.

The motion court denied relief, finding that in closing argument counsel repeatedly attacked Terri as a liar, and thus the state was allowed to respond to an argument provoked by defense counsel (PCR L.F. 459). The motion court said, “Common sense and the law both give credibility to statements made by dying individuals. In this case, the State merely pointed out to the jury another reason for the witness to tell the truth. The State’s argument points out another reason to disbelieve the defense claims of bias” (PCR L.F. 459-460).

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<sup>5</sup> Cole asserts that the argument was approximately forty-five minutes, because the court allowed each side one hour to argue and near the end of defense counsel’s argument, the court informed her that she had fourteen minutes remaining (Tr. 1380, 1464).

The motion court's conclusions are clearly erroneous. It would have been fair retaliation to counsel's argument for the prosecutor to say, "Don't tell Terri Cole by your verdict that she is a liar." But that is not what the prosecutor did. He injected the irrelevant and inflammatory issue of Terri's terminal illness. Furthermore, even the most charitable reading of the argument does not support the motion court's strained interpretation that the prosecutor was arguing that Terri was credible because she was dying.

A prosecutor should refrain from irrelevant arguments that only inflame the jury. State v. Whitfield, 837 S.W.2d 503, 511 (Mo. banc 1992). In Whitfield, the defendant was convicted of first degree murder and sentenced to death. Id. at 506. The murder victim was a paraplegic. Id. During the state's guilt phase closing argument, the prosecutor referred to the defendant as a killer and to the victim as "a helpless paraplegic." Id. at 511. The reviewing court noted that personal characteristics of the victim, in some circumstances, may be relevant to the sentence to be imposed, but are almost never relevant to the determination of guilt. Id. The court declined to grant relief, because review was for plain error. Id.

It is improper for a prosecutor to argue that the jury should base its decision on emotion. State v. Link, 25 S.W.3d 136, 147 (Mo. banc 2000); State v. Taylor, 944 S.W.2d 925, 937 (Mo. banc 1997). In Link, the prosecutor argued in guilt phase that the jury should get "mad as hell" and tell predators like the defendant that the community will not take it anymore. 25 S.W.3d at 147. This Court determined that the argument was improper, but that reversal was not required,

because the argument was made without proper objection. Id. at 147-148. This Court also declined to reverse, because the argument was part of a proper “send a message” argument, and the guilt phase evidence was overwhelming. Id. at 147.

Counsel was ineffective for failing to object to this argument. She admitted that she did not like the argument, and her excuse for not objecting was unreasonable.

### **Guilt Phase Prejudice**

These arguments prejudiced Cole as to each of the charged offenses. The first question for the jury to decide was whether they believed Terri’s version of events or Cole’s version of events. The prosecutor’s reference to Cole as a convicted killer and suggestion that he was charged for a reason damaged Cole’s credibility. The prosecutor’s emotional appeal to the jury playing on the fact that Terri had a terminal illness undermines confidence in the guilty verdicts, because the verdicts should in no part be based on emotion.

Cole was especially prejudiced as to the murder charge. The state submitted instructions on murder in the first degree and murder in the second degree (L.F. 154-155). After the jury decided it believed Terri’s testimony, the main question for the jury to decide was whether Cole coolly reflected before stabbing Curtis. On direct appeal, this Court concluded that there was sufficient evidence from which a reasonable jury could find the element of deliberation beyond a reasonable doubt. 71. S.W.3d 163, 169. On post-conviction appeal, the question is not whether the state made a submissible case, but whether counsel’s

failure to object undermines confidence in the finding of guilt as to first degree murder as opposed to second degree murder. See, State v. Barriner, 34 S.W.3d 139, 151-152 (Mo. banc 2000)(In determining the prejudicial effect of the improper admission of evidence of uncharged bad acts by the defendant the question is not whether the state made a submissible case, but whether the evidence had an effect on the jury's deliberations to the point that it contributed to the result reached).

The state's evidence of deliberation was weak. Under the state's theory Cole went to Terri's residence with the intent to harm her, because he was furious that his wages were garnished for child support (Tr. 1417, 1426). The state presented no evidence that Cole even knew Curtis existed let alone that Cole knew Curtis would be at Terri's house that night. Terri testified that Cole and Curtis had never met (Tr. 970). The best the state could do was to show that a car that Cole would not have recognized was in Terri's driveway (Tr. 1010-1011).

In arguing deliberation, the state relied heavily on Cole's actions prior to entering the house – Cole's anger regarding the garnishment and his statements to his coworkers, putting the jack in his car that morning, having a gun and knife with him, trying to call Terri that night, parking his car on the side of the house where it would not be seen, jumping the fence and walking across the yard (Tr. 1417, 1419-1420, 1425-1426, 1431). While that evidence and argument certainly reflects on Cole's state of mind towards Terri, it proves nothing with respect to Curtis, because the state did not prove that Cole knew Curtis was at the house.

Even after Cole entered the house and saw Curtis, his rage and frustration were directed first at Terri, not Curtis. Terri testified that Cole was yelling words to the effect, “why are you doing this to me” and “I know that you love me” (Tr. 918).

The state, in an attempt to show that Cole was cool, reflective, and deliberate, argued that Cole was sneaking around in the dark and stealthily creeping up on the house (Tr. 1420, 1427-1428, 1431). But the portrait of a cool, reflective, deliberate man falls apart if one believes the state’s assertion that Cole accidentally threw a gun through the patio door and caught his necklace on the car jack as he threw it through the door (Tr. 1418, 1431, 1473).

Cole’s actions after the stabbings – fleeing the house, not calling for help, leaving the state, destroying the clothing he wore – are certainly indicative of consciousness of guilt, but consciousness of guilt as to what offense? Cole’s actions after the stabbings do not reflect on whether he committed first degree murder or a lesser degree of homicide.

The number of stab wounds to Curtis provided evidence of deliberation. But that evidence can be interpreted differently by reasonable persons. In his psychological evaluation of Cole, Dr. Richard Scott wrote that the nature of the wounds to Curtis “may suggest a clear intent to cause death or may reflect a frenzied, out-of-control attack” (Ex. B, p. 5). The state may have made a submissible case as to first degree murder, but the state did not make a compelling case.

The jury deliberated for approximately five hours (Tr. 1481, 1493). The jurors were most likely grappling with the issue of deliberation. A reasonable probability exists that the state's improper arguments influenced the jury's decision on whether Cole deliberated. Since the prosecutor said he could not think of a case that could be more important to the people of St. Louis County, a reasonable probability exists that the jury concluded this had to be a first degree murder case. Since the prosecutor argued that people are charged for a reason, a reasonable probability exists that the jurors concluded that they should not second guess the prosecutor's opinion and should return a guilty verdict for the charged offense of murder in the first degree.

The prosecutor's references, at the very end of his argument, to Cole as a convicted killer and to Terri as a dying woman, fanned the fire of the jurors' emotions. The last portion of the prosecutor's argument was pure emotion designed to get the jury riled up (Tr. 1478-1480). Terri was a mom and clerical worker for a health company, and Cole was a convicted killer who would not let her have Curtis for a friend (Tr. 1478-1479). Terri, a dying woman, deserved justice, and, if Cole wasn't held "fully accountable," anything else would be a victory for Cole (Tr. 1480). By contrasting Terri and Cole as good versus evil, dying woman versus convicted killer, the prosecutor sought a conviction based on emotion, not reason and careful consideration. And, by urging the jury to hold this convicted killer "fully accountable," the prosecutor's improper argument focused on the critical issue of deliberation.

## Penalty Phase Argument

### Patriotic Duty to Impose Death

During his penalty phase argument, the prosecutor argued for the death penalty, saying:

. . . you all told me you could consider it and give it realistic consideration after you've heard all the evidence, and that's what I'm asking you to do now. I'm not trying to tell you this is easy. I'm not telling you it's going to be nice. **But I'll tell you there have always been times in our society when citizens, patriots, from time to time have stepped up and done the things that need to be done to protect society.** It's unfortunate but sometimes it happens. That's what needs to be done in this case.

(Tr. 1654)(emphasis added).

Counsel did not find the argument objectionable (PCR Tr. 364). She did not interpret this argument as the prosecutor telling the jury it was their patriotic duty to return a death sentence (PCR Tr. 364-365). The motion court made no findings of fact and conclusions of law specific to this argument (PCR L.F. 454-463).

The argument is an improper emotional appeal to the jurors' sense of patriotic duty. It is improper to urge the jury to impose the death penalty based on emotion rather than reason. State v. Taylor, 944 S.W.2d 925, 937 (Mo. banc 1997). "It is of vital importance to the defendant and to the community that any

decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” Id., quoting Gardner v. Florida, 97 S.Ct. 1197, 1204 (1977).

The argument implies that if the jurors returned a sentence of life without parole they would be shirking their duty as citizens and patriots. A patriot is “one who loves and loyally or zealously supports one’s own country.” Webster’s New World Dictionary Third College Edition 991 (1988). A decision to impose life without parole does not indicate disloyalty to one’s state or country, and a juror should not be made to feel otherwise.

Counsel’s failure to object was deficient performance, because the argument was improper. Cole was prejudiced, because a reasonable probability exists that the outcome of the penalty phase would have been different but for counsel’s failure to object.

This Court should reverse the judgment of the motion court and remand this case for a new trial due to counsel’s failure to object to the four improper guilt phase arguments. In the alternative, this Court should vacate the death penalty and impose a sentence of life without parole or remand for a new penalty phase.



## **ARGUMENT II**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to investigate and present mitigating evidence of Cole's favorable adjustment to incarceration through readily available witnesses, including: 1) William Bradford, who would have testified that Cole was an ideal inmate who followed all the jail rules; 2) Romel Cochrel, who would have testified that Cole was an exceptional worker who was quite different from most inmates and who made Cochrel's job easier; and 3) Sister Judith Klump, who would have testified that Cole was an excellent Bible student and a leader among the inmates. There is a reasonable probability that the jury would have recommended life imprisonment if defense counsel had presented this evidence.**

If counsel had conducted a reasonable investigation of mitigating evidence, she would have discovered three witnesses associated with the county jail - William Bradford, Romel Cochrel, and Sister Judith Klump - who would have been willing to testify that Cole was an ideal inmate who followed all jail rules, an exceptional worker, and an excellent Bible student. Counsel did not conduct a

reasonable investigation and therefore presented no evidence regarding Cole's ability to adjust favorably to incarceration. A reasonable probability exists that the testimony of Bradford, Cochrel, and Sister Klump would have persuaded at least one juror not to vote for the death penalty, because their testimony would have demonstrated that Cole could be safely incarcerated for his natural life without fear of harm to other inmates or prison personnel, and that he could lead a productive life by performing his prison job well and by taking advantage of programs like religious services.

Cole was housed in the St. Louis County Justice Center for approximately two years and four months before his trial (PCR Tr. 272). During that time, William Bradford was in charge of the care, custody and supervision of inmates, including Cole, assigned to the fifth floor of the jail (Tr. 272). Bradford had daily contact with Cole (PCR Tr. 273). Bradford, who had twenty-three years of experience at the jail, described Cole as "an ideal inmate" who followed all jail rules and conducted himself accordingly at all times (PCR Tr. 272, 275). Bradford said that Cole was "very mild mannered," never argumentative, and respectful of the jail officers (PCR Tr. 275-276).

In the jail, it was considered a privilege for an inmate to have a job (PCR Tr. 274). Cole's job was to deliver carts containing trays to all of the housing units (PCR Tr. 273). Not all inmates were allowed to move between housing units because of security concerns (PCR Tr. 274-275). Bradford described Cole as "an excellent worker" (PCR Tr. 273).

Romel Cochrel, a housing unit officer with twelve years' experience, also had daily contact with Cole during his pre-trial incarceration (PCR Tr. 283-284). Cochrel testified that Cole's job duties included keeping the housing unit clean and mopping and waxing the floor (PCR Tr. 285). Cochrel described Cole as an "exceptional" worker who took pride in his work (PCR Tr. 285). Cochrel found Cole to be "quite different" from other inmates: ". . . one out of every 30 to 40 [inmates] would be the Andre Cole type. And what I mean by that, you would aks [sic] somethin' of him once and whether he was in agreement or disagreement with, you know, he would follow through and do what was aksed [sic] of him. He didn't - - he didn't allow himself to get caught up in a lot of jail house games" (PCR Tr. 286).

Cochrel never knew Cole to commit an infraction requiring a disciplinary "write up" (PCR Tr. 287). Cochrel described Cole as very respectful, having a calm demeanor, never argumentative, and not a troublemaker (PCR Tr. 287-288). Cochrel testified that inmates like Cole make his job easier and said that "if all inmates were like Andre I could do 30 years on that job easily" (PCR Tr. 289).

Sister Judith Klump provided religious instruction classes for jail inmates (PCR Tr. 296-297). Sister Klump testified that Cole participated in her scripture classes (PCR Tr. 296). She described Cole as an excellent student who "knew probably more than most of them" (PCR Tr. 296-297). Sister Klump usually would ask Cole to start the class with a prayer, because "he was so good" and "spoke from the heart" (PCR Tr. 296). Sister Klump described Cole as very polite

and always respectful (PCR Tr. 297-298). She believed the other inmates in class respected Cole, and she thought Cole was a leader (PCR Tr. 298).

Each of these witnesses was willing to testify on Cole's behalf at trial (PCR Tr. 276, 289-290, 298). Sister Klump attended part of Cole's trial (PCR Tr. 298-299).

To establish that counsel was ineffective, a movant must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To establish prejudice, a movant must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

"[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." Skipper v. South Carolina, 106 S.Ct. 1669, 1672 (1986). The standards for capital defense work set forth by the American Bar Association (ABA) provide guidelines to determining what is reasonable performance by counsel. Wiggins v. Smith, 123 S.Ct. 2527, 2536-2537 (2003). The ABA guidelines state that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced

by the prosecutor. Id. at 2537. Counsel should investigate and consider presenting evidence relating to the defendant's prior adult and juvenile correctional experience. Id.

In Williams v. Taylor, the Supreme Court concluded that trial counsel was ineffective for failing to conduct a thorough investigation of the defendant's background. 120 S.Ct. 1495, 1514 (2000). Proper investigation would have uncovered extensive records describing the defendant's "nightmarish childhood," evidence that the defendant was borderline mentally retarded, and prison records showing the defendant's good behavior while incarcerated. Id. The evidence regarding the defendant's incarceration record would have shown that he received commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, and that he was among those inmates least likely to act violently or dangerously. Id. He participated in a prison ministry program and seemed to thrive in a structured environment. Id. The Court concluded that the defendant was prejudiced, because the totality of the mitigating evidence – that adduced at trial and that adduced in the habeas proceeding – may have altered the jury's selection of penalty, even if it did not undermine or rebut the prosecution's death-eligibility case. Id. at 1515-1516.

Appellate review of a motion court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a

definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo. banc 1991).

The motion court made clearly erroneous factual findings and legal conclusions. The court incorrectly summarized Bradford's and Cochrel's testimony as follows:

The corrections officers testified that Movant was a model prisoner, worked hard and never violated the rules. Both officers were unaware of Movant's earlier violations of jail rules while in custody on previous crimes including a conviction for Failure to Return To Confinement. **The witnesses expressed surprise at learning of his prior violations and agreed that it could affect their overall opinions of Movant.**

(PCR L.F. 472)(emphasis added).

This factual finding is clearly erroneous, because it is the exact opposite of Bradford's and Cochrel's testimony. At trial, the state presented evidence that Cole had pleaded guilty to the class A misdemeanor of failure to return to confinement, was sentenced to six months or 75 days in jail with a condition of no passes and no early release, and was given work release (Tr. 1587). At the post-conviction hearing, the state cross-examined Bradford and Cochrel about their knowledge of this prior conviction (PCR Tr. 280, 292-293). The following exchange occurred between the prosecutor and Bradford:

Q Okay. Are you aware that he had previously pled guilty to failure to return to confinement?

A No, sir.

Q Okay. Would that change your opinion of him as an ideal inmate? Somebody, if they're given - - sentenced to Work Release, they fail to return to confinement?

A (pause) No, sir.

(PCR Tr. 280).

Cochrel was similarly cross-examined:

Q Okay. Were you aware that Andre Cole has pled guilty to failing to return to confinement after he had been on Work Release to St. Louis County?

A No, sir.

Q Would you still consider him a good inmate even with that fact?

A Oh, yes, sir.

(PCR Tr. 292).

Bradford's and Cochrel's good opinions of Cole were not affected by the fact that Cole had previously been convicted of failure to return to confinement. The motion court's findings also implied that Cole had multiple "violations" of jail rules while in custody on previous crimes (PCR L.F. 472). Yet no evidence was

presented of any violation other than the failure to return to custody while on work release. The motion court's findings were wrong.

The motion court also inaccurately summarized counsel's testimony: "She stated that she was aware that Movant had a job in jail and that he attended religious services but that she rarely uses this information because her experience has shown her that it is not influential with jurors" (PCR L.F. 473). Counsel's testimony does not support this finding. Counsel testified that she had used evidence of a defendant's good adjustment to jail in other capital cases (PCR Tr. 367-368, 484). She did not testify that her past experience has demonstrated that such evidence is not influential.

Counsel testified that she talked to one or two people at the jail and asked if there was anything helpful they could say for Cole (PCR Tr. 368). Counsel could not remember with whom she spoke and could not say whether she interviewed Bradford or Cochrel (PCR Tr. 368-369). She did not think that she interviewed Sister Klump (PCR Tr. 371). Counsel testified:

Q     Were you aware that Mr. Cole had a job while he was incarcerated in the jail?

A     Yes.

Q     Okay. Can you remember what his duties were within the jail?

A     No, I don't.



Q Okay. Does the fact that he had a job does that hold any particular significance to you?

A Well, it has significance in that they gave only people who were good prisoner who were pretty well - - obeyed the orders, gave them a job. I know that just from general information. But I did not think that that would be helpful in this case.

Q Okay. Now, you testified that you may have talked to some jail personnel?

A Yes.

Q During your visits. Beyond that was there any strategic reason why you did not further investigate his conduct while at the jail by contacting housing unit officers, Cochrel and Bradford, who were in charge –

A No strategic reason, but I contacted something like 25 individuals who were given to me by the Cole family.

Q The Cole family didn't give you any names of personnel from the jail at the –

A No. I'm saying who I did contact.

(PCR Tr. 371-372).

Even though on direct examination counsel testified that she did not have a strategic reason for not putting on these witnesses, on cross-examination, counsel claimed that, although she has used this type of evidence in the past and thought

about calling jail guards to testify in this case, she did not because she had “so many penalty phase witnesses” (PCR Tr. 484). Counsel also speculated that calling jail guards would “open the door” to unfavorable cross-examination:

Q      Were you concerned that if you put jail guards on that it would reemphasize that in a previous incarceration he had walked away from the jail for three and a half months?

A      Well, that was the main - - I think that was probably one of the main thoughts was that it opened the doors of cross-examination by the State. And so may possibly hurt him some way and perhaps something – hang some other prior bad act that I was not aware of that.

(PCR Tr. 484-485).

Counsel’s attempt to justify not calling jail personnel does not qualify as reasonable trial strategy, because counsel could not even recall whether she interviewed Bradford or Cochrel (PCR Tr. 368-369). She said she did not interview Sister Klump (PCR Tr. 371). Bradford and Cochrel testified that counsel did not interview them (PCR Tr. 276, 289). Sister Klump could not recall whether defense counsel interviewed her (PCR Tr. 298).

“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 104 S.Ct. at 2066. Failing to interview witnesses or discover mitigating evidence relates to trial preparation, not

trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8<sup>th</sup> Cir. 1990). Since counsel did not interview Bradford, Cochrel, or Klump, she could not make a reasoned, informed decision as to whether their testimony would aid Cole's case or whether they might give damaging testimony. Furthermore, as the cross-examinations of Bradford, Cochrel, and Klump at the post-conviction hearing revealed, damaging information would not have been elicited from them (PCR Tr. 277-280, 290-293, 300-306).

The motion court also erroneously concluded that the evidence adduced at the post-conviction hearing would have been cumulative to that presented at trial:

In addition, it was trial counsel's strategy to have his family and friends discuss Movant's work ethic, his religious upbringing and participation in church activities. Clearly much of the post-conviction testimony would have been cumulative if not contradictory, to that presented by trial counsel through Movant's family, friends and pastor. At least three mitigation witnesses called on behalf of Movant discussed his church upbringing and religious background including his Pastor. Much of the proposed testimony would have been cumulative if offered.

(PCR L.F. 473).

Several witnesses testified that Cole attended church regularly before he was incarcerated (Tr. 1597, 1607, 1610, 1615, 1623-1624). But no one testified that Cole was an ideal inmate who demonstrated good adjustment to incarceration

by never violating jail rules and by working hard and participating in positive activities such as religious services. The proposed testimony was not cumulative.

Furthermore, all of the penalty phase witnesses were either related to Cole or close family friends (Tr. 1596, 1600, 1602, 1606, 1610, 1612, 1615, 1617, 1623, 1626). Testimony from neutral individuals like Bradford, Cochrel, and Sister Klump would have carried more weight with the jury. See, Skipper v. South Carolina, 106 S.Ct. 1669, 1673 (1986)(testimony from the accused and his wife regarding his good adjustment to jail “was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses – and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges – would quite naturally be given much greater weight by the jury.”)

The motion court also clearly erred in determining that Cole was not prejudiced by counsel’s failure to present this evidence: “Given the aggravating factors found by the jury, Movant has not shown that this additional mitigating testimony would have produced a different result had it been presented at trial” (PCR L.F. 473-474). The jury found two statutory aggravating circumstances: 1) the murder of Curtis involved depravity of mind, because Cole “committed repeated and excessive acts of physical abuse upon Anthony Curtis, and the killing was therefore brutal”; and 2) the murder of Curtis was committed while Cole was engaged in the perpetration of burglary (L.F. 190). The motion court’s conclusion implies that the aggravating circumstances found by the jury were insurmountable

by any evidence. The aggravating circumstances only made Cole death-eligible and did not mandate a death sentence, even if the mitigating evidence counsel should have presented did not directly rebut the statutory aggravating circumstances.

The state's penalty phase evidence and argument focused heavily on Cole's prior acts of violence against Terri (Tr. 1514-1517, 1539-1541, 1543-1550, 1556-1568, 1634-1636, 1639-1640). The state's case included evidence that: 1) Terri obtained restraining orders against Cole; 2) in August 1994, Cole confronted Terri in her home and ripped two phones from the wall; 3) in November 1994, Cole punched Terri's car windshield breaking the glass; and 4) in October 1995, Cole broke into Terri's house by throwing a tire tool through her patio door and then confronted her with a gun (Tr. 1514-1517, 1539-1541, 1543-1550, 1556-1568). The state tried to portray Cole as a lawless individual whose violence was escalating.

Cole was prejudiced by counsel's failure to present the testimony of Bradford, Cochrel, and Klump, because their testimony would have rebutted the state's aggravating evidence, even if it did not directly rebut the specific statutory aggravating circumstances. Cole was not lawless while incarcerated, but obeyed all jail rules and always did what the guards asked of him. He worked hard and maintained his religious beliefs. Counsel could have used the testimony of Bradford, Cochrel, and Klump, in conjunction with the evidence she did present,

to argue that normally Cole was non-violent, and his violent outbursts were confined to the very emotional context of his divorce from Terri.

The death penalty may not constitutionally be applied without “consideration of the character and record of the individual offender and the circumstances of the particular offense.” Woodson v. North Carolina, 96 S.Ct. 2978, 2991 (1976); Eddings v. Oklahoma, 102 S.Ct. 869, 874-876 (1982). Cole was further prejudiced, because, in her closing argument, counsel failed to articulate a reason to spare Cole’s life based on his character and record or on the circumstances of the offense. Counsel’s only mention of Cole’s character was to say:

And you saw 9 or 10 people come in here and testify that they cared for him, that he had done things for them, that he was a worthwhile human being. You heard all these people. And they were all age groups. They were young. Number of older people. Who were friends with his father. And they told you they had helped him. That he had helped them.

(Tr. 1648).

The remainder of counsel’s argument discussed how a sentence of life without parole could be an adequate punishment and contained a general plea for mercy applicable to any capital defendant, with no focus as to why Cole should be extended mercy (Tr. 1645-1652). See, Hall v. Washington, 106 F.3d 742, 750 (7<sup>th</sup> Cir. 1997)(counsel rendered ineffective assistance by failing to make an argument

focused on the defendant's individual character and record but made sweeping and largely irrelevant appeals to the judge's personal and religious beliefs). The testimony of Bradford, Cochrel, and Klump would have provided counsel with a basis for making an individualized argument that Cole is deserving of a sentence of life without parole and that to extend him mercy would not be a futile, wasted gesture, because he demonstrated an ability to function productively while incarcerated.

This Court should reverse the motion court's judgment, vacate the death sentence, and impose a sentence of life without parole or remand for a new penalty phase.

### **ARGUMENT III**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to investigate and present mitigating evidence of Cole's mental state through a psychiatrist, such as Dr. William Logan, who would have testified that at the time of the offenses Cole was under the influence of an extreme emotional disturbance, due to major depression caused by obsession with the separation from his ex-wife and sons, alcohol abuse, and a genetic predisposition to mood disorders and alcohol abuse. Cole was prejudiced, because this testimony would have established the statutory mitigating circumstance of extreme mental or emotional disturbance, and there is a reasonable probability that the jury would have imposed a sentence of life without parole if it had heard this testimony.**

Counsel rendered ineffective assistance when she failed to adequately investigate and present mitigating evidence of Cole's mental state at the time of the offenses. Dr. William Logan, a psychiatrist, would have testified that Cole was suffering from depression and was obsessed with the need to contact Terri and his sons. This evidence would have established the statutory mitigating



circumstance of extreme mental or emotional disturbance and would have given the jury a reason to impose a sentence of life without parole.

### **Dr. Logan's Evaluation**

Dr. William Logan, a board-certified forensic psychiatrist, evaluated Cole during the post-conviction proceedings (PCR Tr. 76, 77-78, 82; Ex. 2, p. 1). Dr. Logan interviewed Cole for four hours and twenty minutes (PCR Tr. 82). He personally interviewed Lillie Cole, Cole's mother; Mona Williams, Cole's sister; James Dawson, Cole's friend; and Pete Ruffino, Cole's co-worker (PCR Tr. 87-88). Dr. Logan reviewed numerous records regarding Cole and his family, including the trial transcript, police reports, medical records, employment records, financial records, educational records, legal records - including those regarding Cole's divorce, and numerous interview notes (PCR Tr. 86-87; Ex. 3). The specific items Dr. Logan reviewed are listed in Exhibit 3.

### **Family History**

Dr. Logan discovered an extensive family history of alcohol abuse and mood disorders (PCR Tr. 101-102; Ex. 2, p. 2-5). Cole's father and paternal grandfather had severe drinking problems and were medically treated for life-threatening consequences of alcohol abuse (PCR Tr. 101). Numerous other relatives also abused alcohol (PCR Tr. 101-102; Ex. 2, p. 3-4).

Cole's father, David Cole, suffered from severe alcoholism with delirium tremens and delusions (PCR Tr. 103, 110, 112; Ex. 2, p. 6-7). During a psychiatric evaluation, David was diagnosed with bipolar disorder and chronic

alcoholism (PCR Tr. 116). When he was evaluated, even though David's alcohol consumption had abated, he still had symptoms of mood dysregulation and psychotic thinking (PCR Tr. 119).

Dr. Logan also found evidence of alcohol abuse and mood disorders on Lillie Cole's side of the family (PCR Tr. 101-102, 117-118; Ex. 2, p. 4). Lillie's brother committed suicide during a domestic situation, and Lillie's mother was bedridden with depression for over a year following the death of Lillie's father (PCR Tr. 118).

Cole's family history of mood disorders and alcohol abuse created an increased likelihood that Cole would suffer from those problems, which have a genetic basis (PCR Tr. 102, 123-124; Ex. 2, p. 5). Suicide by an immediate family member is particularly significant, because it is an inherited influence apart from depression (PCR Tr. 102). Cole was in fact treated for anxiety and depression by his family doctor, Dr. Fred Duhart in August 1994, following a confrontation with Terri, and in July 1996 (PCR Tr. 121-122).

Children who grow up in an unsettling environment, such as that Cole experienced due to his father's alcoholism and delusions, often develop the mind set that life is capricious and a person can only rely on himself (PCR Tr. 97-98). People with this type of childhood experience often have a fantasy of a stable family, and thus become heavily invested in the relationships and families that they form as adults (PCR Tr. 98). Dr. Logan noted that people who knew Cole consistently reported that he was heavily invested in his family (PCR Tr. 98).

### **Adult and Marital History**

Many stressful events contributed to the failure of Cole's marriage (PCR Tr. 125). The first significant event was Terri's pregnancy with their first child, Marcus (PCR Tr. 125; Ex. 2, p. 9). Marcus was born before Terri and Cole married (Ex. 2, p. 9). Terri had a C-section and developed complications, resulting in a prolonged hospital stay and a large bill that insurance did not cover (PCR Tr. 125; Ex. 2, p. 9). Because Terri gained weight during her pregnancy, becoming self-conscious and more withdrawn socially, Cole went out socially alone (PCR Tr. 126; Ex. 2, p. 9). Cole had been enrolled in a welding school, but he quit to earn more money (PCR Tr. 125-126).

A second stressful event was the birth of their second child, Anthony (PCR Tr. 126; Ex. 2, p. 9). This pregnancy also resulted in complications, a lengthy hospital stay, and a large bill (PCR Tr. 126-127; Ex. 2, p. 9-10). With his parents' help, Cole obtained a loan for a car he could not afford (PCR Tr. 127, Ex. 2, p. 10). Although Cole worked two jobs, they still had financial problems (PCR Tr. 127; Ex. 2, p. 10). Employment records reflect that Cole's wages were garnished, because he defaulted on a loan (Ex. 2, p. 10). When Terri and Cole argued, she preferred to continue the discussion, whereas Cole preferred to withdraw from the situation and go have a drink (Ex. 2, p. 11).

A third stressful event was the death of Cole's father (PCR Tr. 128; Ex. 2, p. 10). As an adult, Cole had formed a close relationship with his father, who had stopped drinking (PCR Tr. 128; Ex. 2, p. 10). In 1990, David Cole developed

pancreatic cancer and died about six months after he was diagnosed (PCR Tr. 128; Ex. 2, p. 10). Cole began drinking more after his father's death (PCR Tr. 130-131; Ex. 2, p. 11). Before his father died, Cole promised to care for his mother, and he tried to fulfill that promise (PCR Tr. 129). Cole and Terri argued, because his responsibilities to his mother encroached on his time with Terri and their sons (PCR Tr. 129).

A fourth factor contributing to the marriage's demise was continued financial problems (PCR Tr. 131; Ex. 2, p. 11). Cole and Terri had increasing credit card debt and a higher house payment, due to a debt consolidation loan they obtained by refinancing their house (PCR Tr. 131; Ex. 2, p. 11-12).

A fifth contributing factor was that the arguments between Terri and Cole had escalated to physical confrontations (PCR Tr. 132; Ex. 2, p. 12). During one incident in 1992, the police were called because Terri claimed that Cole had grabbed her arm and Cole claimed that Terri hit him on the head with an ashtray (PCR Tr. 132-133; Ex. 2, p. 12). Cole's alcohol consumption continued to be a source of arguments (PCR Tr. 132). Terri and Cole separated in April 1994 (Ex. 2, p. 13). Although separated, Terri and Cole continued to have a sexual relationship (Ex. 2, p. 16).

Following the separation and divorce, which was final on March 1, 1995, Cole had a series of altercations with Terri (PCR Tr. 136; Ex. 2, Tr. 14-18). In August 1994, immediately following one such altercation, Cole was treated by Dr. Duhart for anxiety and depression (Ex. 2, p. 15). Cole reported to Dr. Logan that

he had been sad and upset, had trouble sleeping and eating, had suicidal thoughts, and felt like a failure (Ex. 2, p. 15). Within a week of the divorce being final, Cole lost his job with Engineered Air Systems (Ex. 2, p. 15). He was reinstated and placed on disciplinary probation for not informing his employer of court appearances, but he again lost his job on July 31, 1995 (Ex. 2, p. 15). He obtained a new job in August 1995 (Ex. 2, p. 15).

In October 1995, Cole waved a gun around and smashed a glass door in Terri's home (Ex. 2, p. 16). A month later, Cole's wages were garnished, because he had not paid child support (Ex. 2, p. 16). In July 1996, Dr. Duhart again treated Cole for anxiety, depression, and high blood pressure (Ex. 2, p.16). Dr. Duhart provided a physician's statement to Cole's employer so that he could be excused from work for approximately two weeks (Ex. 2, p.16). When Cole saw Dr. Duhart the following month, his blood pressure was still high (Ex. 2, p.17). High blood pressure can be stress-related and have an emotional component (PCR Tr. 122). Dr. Logan did not find a history of hypertension in Cole's family (PCR Tr. 122-123). In November 1996, Cole paid all of his child support arrearage and purchased a new home (Ex. 2, p. 17).

### **Mental State at the Time of the Offenses**

Cole reported to Dr. Logan that he and Terri were together for much of 1997 through mid-1998 (Ex. 2, p. 19). But they had another disagreement about money and some discussions about Marcus going to live with Cole (Ex. 2, p. 19-20). Although Cole did not know it at the time, Terri had learned that Cole had

been seeing another woman (Ex. 2, p. 20). Terri again sought enforcement of the child support order (Ex. 2, p. 19). Terri told Cole, “You don’t have to worry about taking care of your kids. They have a new daddy now” (PCR Tr. 140; Ex. 2, p. 19, 23). In July 1998, she stopped communicating with Cole, and he did not see his sons for over a month (Tr. 1248; Ex. 2, p. 19). Terri changed her telephone number and told Mona Williams, Cole’s sister, that she was not to give Cole the new number (Tr. 1208; PCR Tr. 140-141).

Several people who saw Cole during the weeks prior to the stabbings observed that he was depressed (PCR Tr. 141-143). James Dawson, Cole’s friend, observed that Cole was upset and about to “snap” (Ex. 2, p. 23). He noticed that Cole was drinking more (Ex. 2, p. 23). Dawson believed that Cole was obsessed with his relationship with Terri (PCR Tr. 134).

Gene Kennedy, one of Cole’s co-workers, told the police that it was obvious to him that Cole was extremely upset, especially through June and July of 1998 (Ex. 2, p.23). Cole had complained to Kennedy that he was having problems with visitation and that Terri was trying to obtain more money from him (Ex. 2, p.23). Kennedy, who was a friend of Anthony Curtis, said that according to Curtis’s mother, Curtis had been seeing Terri since January of 1998 (Ex. 2, p. 21).

Pete Ruffino, another of Cole’s co-workers, knew that Cole was having trouble with Terri about child support and had been upset for some time (Ex. 2, p. 21). Ruffino recalled that on Cole’s last day of work, Cole was staring at him and giving him hard looks “as if he had reached the end of the line” (Ex. 2, p. 21).

Randall Williams, Cole's cousin, recalled that about a week before the stabbings Cole twice spoke of shooting himself (Ex. 2, p.25). Williams thought that Cole was under the influence of too much alcohol (Ex. 2, p. 25).

Cole reported to Dr. Logan that he had felt depressed, anxious, and hopeless, lost sleep, and had suicidal thoughts (PCR Tr. 144; Ex. 2, p. 22, 25). Cole told Dr. Logan that on the evening of the stabbings he had gone by Terri's house several times, but no one was home (PCR Tr. 145; Ex. 2, p. 27). He returned later and saw a light on at the back of the house (PCR Tr. 146; Ex. 2, p. 27). He took a tire jack, because he planned to break the glass patio door (PCR Tr. 146; Ex. 2, p. 27). He knew that Terri had an alarm system and that the police would probably be called, but he was desperate to confront her about why she had cut off contact with him (PCR Tr. 146; Ex. 2, p. 27).

Cole broke the glass and saw Curtis approaching him (PCR Tr. 147; Ex. 2, p. 27). He saw Curtis reach for a knife, and they struggled (PCR Tr. 147; Ex. 2, p. 28). Cole was cut, and he "snapped" (Ex. 2, p. 28). Cole could not remember what happened after that, except he recalled Terri holding her breast and saying that she had been cut (PCR Tr. 147; Ex. 2, p.28). Cole fled the scene (CPR Tr. 147; Ex. 2, p. 28).

Dr. Logan diagnosed Cole with major depression, single episode, mild to moderate severity (PCR Tr. 90; Ex. 2, p. 30). Dr. Logan concluded to a reasonable degree of medical certainty that, at the time of the offenses, Cole was under the influence of extreme emotional disturbance, due to his degree of

depression and obsession with the issue of separation from his sons and the need to contact Terri (PCR Tr. 147; Ex. 2, p. 35).

### **Standards of Review and Effective Assistance of Counsel in a Capital Case**

Appellate review of a motion court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo. banc 1991).

To establish that counsel was ineffective, a movant must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To establish prejudice, a movant must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The standards for capital defense work set forth by the American Bar Association (ABA) provide guidelines for determining what is reasonable performance by counsel. Wiggins v. Smith, 123 S.Ct. 2527, 2536-2537 (2003). The ABA guidelines state that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and



evidence to rebut any aggravating evidence that may be introduced by the prosecutor. Id. at 2537. “Penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history” and, for the client, “this begins with the moment of conception.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, p. 81 (2003).

Counsel must locate and interview the client’s family members and virtually everyone else who knew the client and his family. Id. at 83. A multi-generational investigation is needed to disclose patterns of family dysfunction and may help strengthen a diagnosis or underscore the hereditary nature of a particular impairment. Id. at 83. Counsel needs to explore medical history, including alcohol use, and family and social history, including family history of mental illness, substance abuse, and familial instability. Id. at 81.

ABA Guidelines state that the defense team on a capital case should consist of no fewer than two attorneys, an investigator, and a mitigation specialist. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, p. 28 (2003).<sup>6</sup>

“The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on

personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Id. at 33.

### **Motion Court's Findings and Conclusions**

The motion court concluded that "counsel made reasonable efforts to investigate the mental status of Movant, as he was examined by both Dr. Scott and Dr. Armour," and "counsel had no reason to dispute the findings of these experts" (PCR L.F. 467). The court said that counsel was not required to shop for an expert who would testify in a particular way (PCR L.F. 465).

The motion court quoted the following excerpt from Dr. Scott's report regarding Cole's mental state at the time of the offenses: "No statements suggested that the defendant was unable to direct his behavior, was speaking as though he did not make sense, or was otherwise behaving in a manner suggesting he was suffering severe impairment in his emotional or cognitive abilities" (PCR L.F. 467-468).

The motion court also found that counsel adequately interviewed Cole and his family concerning his mental state and alcohol use at the time of the offense,

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<sup>6</sup> Cole's defense team consisted of one attorney and a law student (PCR Tr. 424).

and that counsel's inquiries were met with negative responses (PCR L.F. 466).

The court concluded, "Movant has failed to prove that he provided trial counsel with pertinent and sufficient information regarding how to contact potential witnesses, or that such information was readily available" (PCR L.F. 466).

The motion court also found that Dr. Logan's expert opinion was not credible, because it was based on "the limited materials Movant's counsel chose to expose" and was "not based upon any objective evidence" (PCR L.F. 469)

The motion court concluded that the presentation of Dr. Logan's testimony would have been inconsistent with the guilt phase defense that Cole did not commit the offenses: "To call witnesses to portray Movant in the penalty phase as a murderer who was acting under extreme emotional disturbance when he committed the same offense he denied would be inconsistent and ineffective" (PCR L.F. 469).

#### **Dr. Scott and Dr. Armour Did Not Assess Mitigating Circumstances**

The motion court clearly erred in concluding that, because counsel had Cole examined by Dr. Scott and Dr. Armour and was not required to shop for an expert, her investigation was reasonable (PCR L.F. 465, 467). This conclusion is clearly erroneous, because neither Dr. Scott nor Dr. Armour assessed mitigating circumstances. Dismissively rejecting Cole's claim on the ground that it calls for expert shopping overlooks the critical fact that prior to trial no expert ever evaluated Cole's mental state in the context of mitigation.

Defense counsel filed a Motion for Appointment of Psychiatrist, asserting that based “on information supplied by members of the family of defendant and from counsel’s own observation of the defendant,” counsel believed that Cole had a mental disease or defect that made him incompetent to stand trial and that precluded his criminal responsibility for the alleged offenses (L.F. 33-34). The court ordered Dr. Scott to evaluate Cole and prepare a report providing an opinion as to whether Cole had a mental disease or defect and whether, as a result, Cole was not competent to stand trial or was not criminally responsible for the alleged offenses (L.F. 37-38). The court’s order did not direct Dr. Scott to provide an opinion as to whether any mitigating circumstances existed (L.F. 37-38).

Counsel did not recall whether she asked Dr. Scott to provide her with an opinion as to whether any mitigating factors existed (PCR Tr. 432). She testified, “I may have, but I may not have. I wanted to get a Chapter 552 straight evaluation first” (PCR Tr. 432). Dr. Scott testified that defense counsel did not ask him to look for any mitigating circumstances, such as whether Cole was under severe emotional or mental distress at the time of the offenses (PCR Tr. II 92). Because Department of Mental Health evaluations are always done pursuant to a court order, Dr. Scott would have told defense counsel to obtain a court order specifying an evaluation for mitigating circumstances (PCR Tr. II 92). Dr. Scott explained that he would never decide on his own to exceed the scope of a court’s order and render an opinion about the existence of mitigating circumstances, because mitigation “presumes guilt” (PCR Tr. II 92).

Counsel claimed that she hired Dr. Michael Armour to do a second evaluation of Cole for the purpose of looking for mitigating evidence (PCR Tr. 421). She expected Dr. Armour to act as a mitigation specialist (PCR Tr. 425). Counsel's motion requesting a second evaluation, however, did not mention anything about seeking an expert opinion as to mitigating circumstances (Supp. L.F. 1). The court's order for the second evaluation only directed Dr. Armour to assess Cole's competency and criminal responsibility (Supp. L.F. 2-3). The order did not direct Dr. Armour to provide an opinion as to the existence of any mitigating circumstances (Supp. L.F. 2-3).

Dr. Armour testified that counsel did not ask him to assess any mitigating circumstances or, more specifically, to assess whether Cole was under severe emotional or mental distress at the time of the offenses (PCR Tr. II 75-76). Dr. Armour also testified that he stayed within the limits of the court's order for the evaluation (PCR Tr. II 76).

The motion court clearly erred in failing to recognize that the scope and purpose of Dr. Scott's and Dr. Armour's pretrial evaluations did not encompass mitigation. The opinions of Dr. Scott and Dr. Armour - that Cole was competent to proceed to trial and that he did not suffer from a mental disease or defect rendering him incapable of knowing and appreciating the nature, quality, or wrongfulness of his conduct – do not refute Cole's claim that counsel was ineffective for failing to obtain and present an expert opinion that he was under the influence of an extreme emotional disturbance at the time of the offenses. After

all, the submission of statutory mitigating circumstances necessarily presumes that the defendant was competent and possessed the ability to knowingly cause the victim's death after deliberation. See, State v. Johnson, 968 S.W.2d 686, 702 (Mo. banc 1998).

In Kenley v. Armontrout, the court determined that counsel was ineffective for failing to investigate and present mitigating evidence, even though counsel had the defendant evaluated by a psychiatrist before trial. 937 F.2d 1298 (8<sup>th</sup> Cir. 1991). The psychiatrist determined that the defendant was competent to stand trial and did not suffer from a mental disease or defect. Id. at 1305. The psychiatrist claimed that he reviewed records pertinent to the defendant and interviewed members of the defendant's family, but his report contained no references to such information. Id. at 1307. Defense counsel did not investigate further, because he believed the expert's report to be conclusively non-mitigating. Id. at 1300.

The court reversed the defendant's death sentence, finding that counsel's decision not to investigate further was unreasonable. Id. at 1308. The court wrote,

The fact that [the pretrial expert's] report rules out a mental disease or defect and incompetency does not mean it rules out lesser but potentially mitigating conditions and disorders. We are aware of no legal authority strictly limiting mitigating medical, psychiatric and psychological evidence to that of legal insanity or incompetence. In fact, evidence of conditions, disorders and disturbances are precisely

the kinds of facts which may be considered by a jury as mitigating evidence.

Id. at 1307.

Counsel's investigation of Cole's competency and criminal responsibility did not alleviate her duty to investigate mitigating evidence. See, Coney v. State, 845 So.2d 120, 129-130 (Fla. 2003)(trial counsel was ineffective for failing to adequately investigate and prepare mitigating evidence where he belatedly retained a psychiatrist to examine the defendant following his conviction, a mere three days before the penalty phase was to begin, and the psychiatrist only addressed the defendant's competency); also see, Jacobs v. Horn, 129 F.Supp.2d 390, 405 (M.D.Pa. 2001)(counsel's investigation of mitigating evidence was deficient where he retained an expert to only evaluate defendant's competency and criminal responsibility). Counsel's investigation cannot be deemed adequate, because it did not encompass mitigation.

**Dr. Scott's and Dr. Armour's Findings Should Have Alerted Counsel**

**To the Need for Further Investigation**

The motion court also clearly erred in finding that counsel had no reason to dispute the findings of Dr. Scott and Dr. Armour (PCR L.F. 467). The finding is clearly erroneous because it misses the point. Counsel did not have a reason to dispute the findings that Cole was competent to proceed to trial and criminally responsible for his actions. But the reports should have pointed counsel to other

areas of investigation for purposes of mitigation. Counsel had no basis to deem the reports conclusively non-mitigating.

Portions of Dr. Scott's report regarding Cole's mental state at the time of the offenses highlighted the need for additional investigation that would have produced evidence in support of the extreme mental or emotional disturbance mitigating circumstance. Dr. Scott wrote that Cole's repeated stabbing of Curtis "may reflect a frenzied, out-of-control attack" (Ex. B, p. 5). Dr. Scott also wrote that, "during the alleged attack, the defendant reportedly questioned Victim #1 [Terri], asking her why she would do this to him and repeatedly stating that he loved her. Such statements in the context of their off-and-on relationship suggest that he was reacting out of anger, rejection, and/or hurt." (Ex. B, p.6). Dr. Armour also related Cole's account of his off-and-on relationship with Terri and their continuing sexual relationship after their divorce (Ex. C, p. 5).

Both reports highlighted the need to further investigate Cole's alcohol abuse. Both doctors diagnosed Cole with alcohol abuse (Ex. A, p. 6; Ex. C, p. 8). Dr. Scott noted that Terri believed Cole had significant problems due to alcohol (Ex. A, p. 4). Dr. Scott and Dr. Armour observed that police officers who responded to the January 1995 incident, in which Cole was arrested for violation of an *ex parte* order, noted a strong odor of alcohol on Cole (Ex. A, p. 3; Ex. C, p. 7). Even though Cole denied having a drinking problem to Dr. Scott, when pressed, he admitted to drinking more often than he had initially disclosed (Ex. A,



p. 4). The diagnoses of alcohol abuse by both doctors should have alerted counsel to the need to obtain Cole's medical records.

The motion court clearly erred in overstating the significance of Dr. Scott's comment that: "No statements suggested that the defendant was unable to direct his behavior, was speaking as though he did not make sense, or was otherwise behaving in a manner suggesting he was suffering severe impairment in his emotional or cognitive abilities" (PCR L.F. 467-468). The motion court's finding is erroneous, because it takes the quote out of context. The excerpt is the sixth of eight enumerated paragraphs listing information "pertinent to the question of whether the defendant suffered a mental disease or defect at the time of the alleged offense" (Ex. B, p. 4-5). Dr. Scott wrote, "**According to the police report**, the defendant was described as angry and aggressive. No statements suggested that the defendant was unable to direct his behavior, was speaking as though he did not make sense, or was otherwise behaving in a manner suggesting he was suffering severe impairment in his emotional or cognitive abilities" (Ex. B, p. 5)(emphasis added).

The motion court used the excerpt to imply that Dr. Scott specifically found that Cole was not under the influence of extreme mental or emotional disturbance (PCR L.F. 467-468). But, Dr. Scott was merely referencing a single source of information, a police report, which apparently contained no statements suggesting that Cole had a severe impairment in his emotional or cognitive abilities (Ex. B, p. 5). Dr. Scott was also drawing a conclusion as to the existence of a mental disease

or defect, which is not a prerequisite to a finding of the extreme mental or emotional disturbance mitigating circumstance. Section 565.032.3(2), RSMo 2000.

### **Information as to Cole's Mental State was Readily Available**

The motion court clearly erred in concluding that counsel “reasonably concluded based upon the denials of Movant and his family that there was no basis in pursuing the matter [of his mental status] further” and that “Movant has failed to prove that he provided counsel with pertinent and sufficient information regarding how to contact potential witnesses, or that such information was readily available” (PCR L.F. 466, 470).

If defense counsel had conducted even a minimal investigation of Cole's state of mind at the time of the stabbings, she would have obtained useful mitigating evidence. Pete Ruffino, James Dawson, Dr. Fred Duhart, and Lillie Cole could have provided counsel with mitigating evidence. But counsel either failed to contact these people or failed to interview them thoroughly.

Pete Ruffino, a co-worker of Cole's, testified for the state during guilt phase that he had overheard Cole threaten to kill his wife if he had to pay any more child support (Tr. 870, 872). Counsel thought she interviewed Ruffino, although she could not recall what he said, and her file did not contain any notes reflecting an interview of Ruffino (PCR Tr. 438-439). Ruffino testified that defense counsel never contacted him, but he would have been willing to speak to her and to any experts with whom she wanted him to speak (PCR Tr. 13-14). Ruffino would have been willing to testify at trial to the same information he provided in his post-conviction testimony (PCR Tr. 14).

Ruffino testified at the post-conviction hearing that Cole was normally upbeat and cheerful and had a good attitude (PCR Tr. 7). But, when Cole spoke of his children, his personality was very different (PCR Tr. 8). Ruffino said, “He just would get real depressed and quiet and you could tell a different appearance on his face. That he was sad” (PCR Tr. 8). The last day that Ruffino saw Cole at work, Cole was very depressed, angry, and “just didn’t appear as his normal self” (PCR Tr. 8-9). Cole’s demeanor “was completely opposite of what he usually did” (PCR Tr. 9). Ruffino observed other co-workers try to speak with Cole and calm him down, but Cole would not speak and would not acknowledge anybody (PCR Tr. 11).

James Dawson testified for the defense during the guilt and penalty phases (Tr. 1391). Dawson saw Cole around 6:00 or 6:30 on the evening of the stabbings at a Radio Shack store where Dawson worked (Tr. 1391-1392). Dawson testified that Cole was shopping for a satellite dish for his sons (Tr. 1393). Dawson was busy at the time, because he was the only salesman on the floor (Tr. 1393). Dawson did not notice anything out of the ordinary about Cole (Tr. 1394). During penalty phase, Dawson testified that Cole was a good friend who always helped Dawson if he needed something (Tr. 1626-1627).

At the post-conviction hearing, Dawson testified that after Cole and Terri separated, Cole was not his normal, happy self, but was sad and drinking heavily (PCR Tr. 28-29). Dawson advised Cole that, while it would be good to remain friends with Terri, if they were going to separate, it would not be a good idea “to

keep going back and forth in a relationship” (PCR Tr. 32). About two weeks before the stabbings, Dawson helped Cole put an air conditioning unit in Cole’s mother’s house (PCR Tr. 33). Cole appeared drunk, upset, and frustrated (PCR Tr. 33-34). Cole told Dawson that Terri was not allowing him to see his sons (PCR Tr. 34). Terri had told Cole that he did not have to worry about seeing his children, because the boys had a new daddy (PCR Tr. 34). Cole was hurt, and Dawson tried to reassure him that he would always be his sons’ father (PCR Tr. 34-35).

Dawson recalled that he spoke with counsel by telephone before he testified (PCR Tr. 35). Counsel did not question him about any of the topics he testified to at the post-conviction hearing (PCR Tr. 35-36, 39). Counsel did not ask Dawson anything about Cole’s drinking or whether he seemed depressed (PCR Tr. 39). Counsel did not ask Dawson to speak to Dr. Scott or Dr. Armour, but Dawson would have been willing to speak with them (PCR Tr. 36). Dawson would have been willing to discuss with counsel and to testify at trial to all of the topics raised in his post-conviction testimony (PCR Tr. 36). Counsel did not know that Terri had told Cole that he did not need to worry about his sons because they had a new daddy (PCR Tr. 440).

Counsel made no attempt to obtain Cole’s medical records (PCR Tr. 440-441). Counsel claimed she did not obtain his records, because he indicated that he had never been treated for a mental disease or defect and had only been treated for minor things (PCR Tr. 440-441). Both Dr. Scott and Dr. Armour diagnosed Cole

with alcohol abuse, and their reports referenced his drinking problem, thus counsel should have been alerted to the need for Cole's medical records (Ex. A, p. 3, 4, 6; Ex. C, p. 7, 8). Even if Cole had not been diagnosed with alcohol abuse, it is difficult to fathom how any investigation of a capital offense would not warrant obtaining the accused's medical records.

Dr. Fred Duhart treated Cole and his parents, David and Lillie (PCR Tr. II 58-59). If counsel had contacted Dr. Duhart, she would have learned that Dr. Duhart diagnosed Cole with anxiety and depression on August 15, 1994 and July 27, 1996 (PCR Tr. II 60). The diagnosis in August 1994 was one week after Cole's separation from Terri (Tr. 1515).

If counsel had consulted with Dr. Duhart, she also could have obtained David's medical records (PCR Tr. II 61-62).<sup>7</sup> Dr. Duhart treated David for severe alcoholism and hallucinations (PCR Tr. II 60). David sought treatment sporadically in the 1970's and early 1980's for delirium tremens and delusional thinking (PCR Tr. 103-104, 110-112). In 1985, David was diagnosed with bipolar disorder and chronic alcoholism (PCR Tr. 116). Dr. Duhart would have been willing to speak with counsel, to provide her with the medical records, and to testify at trial (PCR Tr. II 61-62).

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<sup>7</sup> Lillie testified that she would have signed an authorization for Dr. Duhart to release her husband's medical records, but counsel never asked her to do so (PCR Tr. II 28).

Another source of information defense counsel failed to take advantage of was Cole's mother, Lillie. At the post-conviction hearing, Lillie testified that David was a "nonfunctional alcoholic," who went on drinking binges during which he drank continuously and would not eat or go to work (PCR Tr. II 6). David was fired from the U.S. Postal Service twice because of his drinking (PCR Tr. II 8). Lillie described David's hallucinations (PCR Tr. II 6-7). He once saw a leprechaun that told him to jump out of a window, which he attempted to do (PCR Tr. II 6-7). Another time, a devil told David to go to the airport (PCR Tr. II 7). These hallucinations occurred when Cole was around ages seven and twelve (PCR Tr. II 7).

Lillie also was employed at the U.S. Postal Service (PCR Tr. II 10-11). When Cole was a child, Lillie worked from 4:00 p.m. to 12:30 a.m., so David was responsible for the children's care in the evening (PCR Tr. II 11). David's drinking was a source of embarrassment for Cole at times, such as one occasion when David attempted to coach Cole's baseball team, but was so drunk that it was apparent to the other kids and parents who were at the game (PCR Tr. II 10). There were times when Cole saw his father passed out on the floor (PCR Tr. II 8-9).

David's parents, Elizabeth Cole and G.W. Rutledge, were both alcoholics (PCR Tr. II 11-14). Elizabeth lived in Alabama, but she stayed with the Cole family in St. Louis when her drinking was out of control and the Alabama relatives could not handle her (PCR Tr. II 13). The Cole family regularly visited

G.W. Rutledge in Alabama (PCR Tr. II 14). Rutledge was verbally abusive when he drank (PCR Tr. II 14). Several other family members also have drinking problems (PCR Tr. II 15).

Lillie's mother, Amy Henderson Lowe, and her brother, Leon Henderson, suffered from depression (PCR Tr. II 15-16). Amy Lowe became depressed after her husband's death and for about a year and a half stopped walking or caring for her children (PCR Tr. II 15-16). A friend of Amy's made sure that Lillie and her siblings were clothed and fed (PCR Tr. II 16). Leon Henderson had several unstable relationships and ultimately committed suicide (PCR Tr. II 16-17).

Lillie observed signs of depression in Cole during the week before the stabbings (PCR Tr. II 21-24). Cole was not his "normal happy self," and it appeared "like he was going to snap or going to have a nervous breakdown" (PCR Tr. II 21). Terri would not let Cole see his sons, and he was "terribly upset" and worried (PCR Tr. II 21, 24-25). Lillie was concerned that Cole might be suicidal, because he told her, "you're not going to see me any more. I just can't take what's going on" (PCR Tr. II 22, 24).

Lillie testified during the guilt and penalty phases, but her testimony did not include any of the information elicited at the post-conviction hearing (Tr. 1218-1242, 1596-1599).

Counsel claimed that she asked Lillie about a family history for mental illness and alcoholism, "but there was no red flag put out by the family" (PCR Tr. 426). Lillie testified that counsel did not ask her any questions about her



husband's drinking, but she would have been willing to discuss his drinking problem and willing to provide counsel with a release for David's medical records (PCR Tr. II 25-26, 28). According to Lillie, counsel did not ask if she observed any signs of depression in Cole around the time of the stabbings (PCR Tr. II 26). Counsel did not ask Lillie to speak with either Dr. Scott or Dr. Armour (PCR Tr. II 27). Lillie would have been willing to speak with the doctors and discuss with counsel any of the topics raised in her post-conviction testimony (PCR Tr. II 27-28).

The motion court's finding that Cole failed to prove that he provided counsel with pertinent and sufficient information regarding how to contact potential witnesses is inexplicable, given that Ruffino, Dawson, and Lillie Cole testified at the trial, and Dawson and Lillie Cole testified for the defense. Counsel thought she interviewed Ruffino, but her file did not contain any notes reflecting what they discussed (PCR Tr. 438-439). When asked if she questioned Dawson about anything other than the time he saw Cole on the night of the stabbings, counsel was evasive: "Well, I asked him if there was any information that he had in his personal possession that Andre might have said or someone might have said - - that would have been hearsay; I would have had to go further with it - - as far as the incident was concerned. But anything else would not be relevant." (PCR Tr. 440).

Counsel admitted that she did not obtain any records regarding Cole or his family; the only records she had were those provided by the state, which included

some of Cole's employment records and Terri's medical records (PCR Tr. 426-428, 437-438, 440-441). She did not ask the family to help her obtain medical records, because she "had no reason to suspect something was wrong" (PCR Tr. 437-438). Counsel testified that she knew the name of Cole's doctor, but she did not obtain Cole's medical records (PCR Tr. 441). She could have easily located Dr. Duhart; he has been practicing medicine at the same location in St. Louis for the past thirty years (PCR Tr. II 58).

Counsel did not conduct an adequate investigation to allow her to reasonably conclude that further investigation was not needed. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 104 S.Ct. at 2066. Counsel testified that she considered investigating mitigating evidence of extreme mental or emotional disturbance, but she did not think the court would submit the mitigating circumstance to the jury:

Q      Okay. Did you consider presenting evidence in support of the mitigating circumstance that the Murder in the First Degree was committed while the Defendant was under severe - - or excuse - extreme mental or emotional disturbance?

A      No, I did not offer it.

Q      I was asking did you consider investigating?

A      I did consider but I didn't think it would be given.

(PCR Tr. 429).

The essence of counsel's testimony was that Cole, Lillie, and Mona Williams did not tell her anything that would alert her to the need for further investigation (PCR Tr. 426-427, 437-438). Even if this were true, it does not excuse counsel from her duty to investigate. The duty to investigate is neither limited to matters about which the defendant has informed counsel nor lessened by a lack of specificity of the information conveyed by members of the defendant's family. People v. Morgan, 719 N.E.2d 681, 705-706 (Ill. 1999). "The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." Carter v. Bell, 218 F.3d 581, 596 (6<sup>th</sup> Cir. 2000).

#### **Dr. Logan's Opinion was Based On Credible Evidence**

The motion court clearly erred in concluding that, because Dr. Logan's opinion was based on "the limited materials Movant's counsel chose to expose" and was "not based upon any objective evidence," his expert opinion was not credible. The materials and documents Dr. Logan relied upon are set forth in Exhibit 3. These materials included the police reports, the medical examiner's report, the prosecutor's investigator's report, and the trial transcript, which are the same materials used by Dr. Scott and Dr. Armour (Ex. A, p. 1-2; Ex. B, p. 1-2; Ex. C, p. 1; Ex. 3). Dr. Logan actually reviewed more materials than either Dr. Scott or Dr. Armour (Ex. 3). Dr. Logan thoroughly reviewed all information concerning

Cole's prior convictions and bad acts involving Terri and included that information in his report (Ex. 2, p. 14-18). Dr. Logan's opinion was based on objective evidence.

The motion court found that Dr. Logan's opinion was biased, because he relied on interviews of Cole's friends and family (PCR L.F. 466-467). The motion court erroneously faulted Dr. Logan for relying on the types and sources of information required for an appropriate mitigation investigation under the ABA guidelines in death penalty cases. Counsel must locate and interview the client's family members and virtually everyone else who knew the client and his family. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, p. 83 (2003). Counsel needs to explore medical history, including alcohol use, and family and social history, including family history of mental illness, substance abuse, and familial instability. *Id.* at 81. Dr. Logan conducted the exact type of evaluation required by prevailing professional norms.

**Evidence of Extreme Emotional Disturbance Would Not Have Been**

**Inconsistent with the Guilt Phase Defense**

The motion court clearly erred in concluding that it would have been inconsistent and ineffective "to call witnesses to portray Movant in the penalty phase as a murderer who was acting under extreme emotional disturbance when he committed the same offense he denied" (PCR L.F. 469). True, during his testimony Cole did not admit that he stabbed Curtis or Terri. But, he admitted that he was bothered by the garnishment of his wages, and he was tired of Terri not

responding to his attempts to contact her, so he threw a car jack through the sliding glass door (Tr. 1251-1252, 1267-1268). Cole put himself at the scene of the crime and admitted some degree of participation in the events, but not culpability for the stabbings.

Counsel did not argue that the jury should have residual doubt as to Cole's guilt. Presenting emotional disturbance evidence would not have been inconsistent with counsel's penalty phase strategy of trying to humanize Cole (PCR Tr. 373-374, 425). The evidence would have helped to humanize Cole by explaining why he would go to the extreme of throwing a car jack through the door, thus setting in motion the tragic events that followed.

### **Prejudice**

Cole was prejudiced by counsel's failure to adequately investigate and present evidence that he was under the influence of extreme emotional disturbance at the time of the offenses. Counsel's entire penalty phase presentation, from opening statement to closing argument, was vague and unfocused. Counsel opened by asserting that Cole had never been in trouble before the charged offenses occurred (Tr. 1509). After the state objected, counsel said that Cole's prior convictions happened during "a stormy time" in his life (Tr. 1510). Counsel promised to present evidence of what Cole was like and the life he led before the stabbings happened (Tr. 1510).

The state presented evidence of Cole's prior convictions and bad acts. On August 8, 1994 and February 6, 1995, orders of protection were entered enjoining

Cole from abusing or threatening Terri, and he was prohibited from entering her house (Tr. 1515-1516). On August 14, 1994, Cole entered Terri's house and ripped two telephone cords from the wall (Tr. 1539-1540).

On September 18, 1994, the police stopped Cole for speeding, and they found a gun in the car (Tr. 1518-1520, 1529-1530). On March 17, 1995, Cole pleaded guilty to unlawful use of a weapon; imposition of sentence was suspended, and Cole was placed on probation for four years (Tr. 1584).

On November 11, 1994, Terri discovered Cole outside her house unscrewing her security lights (Tr. 1540). Cole cracked the windshield of Terri's car by punching it with his fist (Tr. 1540). On December 15, 1994, Cole pleaded guilty to the class A misdemeanor of violating an order of protection and was sentenced to six months in jail, which was suspended, and placed on two years probation (Tr. 1585-1586).

On January 16, 1995, Cole came to Terri's house and stood at the front door yelling at her (Tr. 1543). Terri refused to let him in and called the police (Tr. 1543, 1556-1557).

On October 5, 1995, a few days after Cole had been directed to pay his child support, he broke into Terri's house by smashing the patio door (Tr. 1512-1513, 1544-1545). Cole was "carrying on" about the child support order and brandished a gun (Tr. 1548-1549). The police arrested Cole a short distance from Terri's house (Tr. 1560-1562). Cole had two loaded guns in his possession (Tr. 1563-1567). On April 18, 1996, Cole pleaded guilty to unlawful use of a weapon

and was sentenced to nine months in the county jail, and work release was authorized (Tr. 1586-1587). On July 1, 1997, Cole pleaded guilty to the class A misdemeanor of failure to return to confinement, because he did not return to the jail while on the work release program (Tr. 1587).

The state also presented the testimony of Curtis' sister, brother-in-law, and mother, who described how much they loved and missed Curtis (Tr. 1588-1594).

Defense counsel called ten witnesses who testified that Cole was dependable, helpful, a good father, son, and brother, good at sports, a hard worker, and he attended church regularly (Tr. 1596-1597, 1600-1601, 1607, 1610-1611, 1613, 1618-1619, 1627). Counsel offered no evidence of the "stormy life" Cole was experiencing at the time of the prior convictions.

In a brief closing argument, counsel made a general plea for mercy and argued that a death sentence would only satisfy a desire for revenge and would not bring Curtis back (Tr. 1646-1652). Counsel urged the jury to "take the high road" and impose a sentence of life without parole, which would serve the need for punishment (Tr. 1647, 1651-1652). The argument was largely a general statement in opposition to the death penalty, and thus one with no appeal to a death-qualified jury. Counsel made no attempt to explain how Cole's life spun out of control after he lost his wife and children and thus why he broke into Terri's house the night of the stabbings.

Counsel requested and the court submitted one mitigating circumstance – whether Cole had no significant history of prior criminal activity (L.F. 182).

Given the sequence of events following Cole and Terri's separation, the state easily rebutted this mitigating circumstance. But if counsel had presented evidence of Cole's depression following his separation from Terri up until the time of the stabbings, counsel could have provided a context for Cole's prior convictions and made a convincing case for a life sentence. The state could point to no bad act committed by Cole that predated his separation from Terri in August 1994. A stark contrast exists between Cole's behavior before August 1994 and his behavior thereafter. There is more than a reasonable probability that the jurors would have concluded that the stabbings were not the result of a depraved mind, but the result of overwhelming emotional distress caused by Cole's failed marriage and being told that his children "have a new daddy."

This Court should reverse the judgment of the motion court, vacate the death sentence, and impose a sentence of life without parole or remand for a new penalty phase.



#### **ARGUMENT IV**

**The motion court clearly erred in denying Cole's motion for post-conviction relief, because Cole was denied his rights to the effective assistance of counsel, due process of law, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel failed to investigate and present mitigating evidence of Cole's mental state through readily available witnesses, including: 1) Pete Ruffino, who would have testified that Cole, who was normally upbeat and cheerful, became depressed when he spoke of his children and was very depressed and not himself shortly before the stabbings; 2) James Dawson, who would have testified that about two weeks before the stabbings Cole was upset, drunk, and frustrated, because Terri would not let him see his children, and because she had said that the children had a new daddy; 3) Dr. Fred Duhart, who would have testified that he treated Cole for anxiety and depression and that he treated Cole's father for severe alcoholism and hallucinations; and 4) Lillie Cole, who would have testified about her husband's alcoholism, the family history for alcoholism and mood disorders, and how depressed Cole was before the stabbings. Cole was prejudiced, because a reasonable probability exists that the jury would have imposed a life sentence if the jury had heard this mitigating evidence.**

Counsel did not have to rely solely on expert testimony to present mitigating evidence of Cole's mental state at the time of the offenses. Pete Ruffino, James Dawson, Dr. Fred Duhart, and Lillie Cole could have provided mitigating testimony had counsel thoroughly investigated these witnesses. Each of the witnesses was readily available and willing to testify. Ruffino, Dawson, and Lillie Cole testified, but because counsel's investigation of these witnesses was deficient, she was unable to elicit helpful mitigating evidence.

Pete Ruffino, a co-worker of Cole's, testified for the state during guilt phase that he had overheard Cole threaten to kill his wife if he had to pay any more child support (Tr. 870, 872). At the post-conviction hearing, Ruffino testified that he observed that Cole was normally upbeat and cheerful and had a good attitude (PCR Tr. 7). But, when Cole spoke of his children, his personality became very different (PCR Tr. 8). Ruffino said, "He just would get real depressed and quiet and you could tell a different appearance on his face. That he was sad" (PCR Tr. 8). The last day that Ruffino saw Cole at work, Cole was very depressed, angry, and "just didn't appear as his normal self" (PCR Tr. 8-9). Ruffino said that Cole's demeanor "was completely opposite of what he usually did" (PCR Tr. 9). Ruffino observed other co-workers try to speak with Cole and calm him down, but Cole would not speak or acknowledge anybody (PCR Tr. 11).

James Dawson testified for the defense during the guilt and penalty phases (Tr. 1391). Dawson saw Cole around 6:00 or 6:30 on the evening of the stabbings at a Radio Shack store where Dawson worked (Tr. 1391-1392). Dawson testified

that Cole was shopping for a satellite dish for his sons (Tr. 1393). Dawson was busy at the time, because he was the only salesman on the floor (Tr. 1393). Dawson did not notice anything out of the ordinary about Cole (Tr. 1394). During penalty phase, Dawson testified that Cole was a good friend who always helped Dawson if he needed something (Tr. 1626-1627).

At the post-conviction hearing, Dawson testified that after Cole and Terri separated, Cole was not his normal, happy self, but was sad and drinking heavily (PCR Tr. 28-29). Dawson advised Cole that, while it would be good to remain friends with Terri, if they were going to separate, it would not be a good idea “to keep going back and forth in a relationship” (PCR Tr. 32). About two weeks before the stabbings, Dawson helped Cole put an air conditioning unit in Cole’s mother’s house (PCR Tr. 33). Cole appeared drunk, upset, and frustrated (PCR Tr. 33-34). Cole told Dawson that Terri was not allowing him to see his sons (PCR Tr. 34). Terri had told Cole that he did not have to worry about seeing his children, because the boys had a new daddy (PCR Tr. 34). Cole was hurt, and Dawson tried to reassure him that he would always be his sons’ father (PCR Tr. 34-35).

Dr. Fred Duhart treated Cole and his parents, David and Lillie (PCR Tr. II 58-59). If counsel had contacted Dr. Duhart, she would have learned that Dr. Duhart diagnosed Cole with anxiety and depression on August 15, 1994 and July 27, 1996 (PCR Tr. II 60). The diagnosis in August 1994 was one week after Cole and Terri separated (Tr. 1515). If counsel had consulted with Dr. Duhart, she also

could have obtained David's medical records (PCR Tr. II 61-62).<sup>8</sup> Dr. Duhart treated David for severe alcoholism and hallucinations (PCR Tr. II 60).

At the post-conviction hearing, Lillie testified that David was a "nonfunctional alcoholic" who went on drinking binges during which he drank continuously and would not eat or go to work (PCR Tr. II 6). David was fired from the U.S. Postal Service twice because of his drinking (PCR Tr. II 8). Lillie described David's hallucinations (PCR Tr. II 6-7). He once saw a leprechaun that told him to jump out of a window, which he attempted to do (PCR Tr. II 6-7). Another time, a devil told David to go to the airport (PCR Tr. II 7). These hallucinations occurred when Cole was around ages seven and twelve (PCR Tr. II 7).

Lillie also was employed at the U.S. Postal Service (PCR Tr. II 10-11). When Cole was a child, Lillie worked from 4:00 p.m. to 12:30 a.m., so David was responsible for the children's care in the evening (PCR Tr. II 11). David's drinking was a source of embarrassment for Cole at times, such as one occasion when David attempted to coach Cole's baseball team, but was so drunk that it was apparent to the other kids and parents who were at the game (PCR Tr. II 10).

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<sup>8</sup> Lillie testified that she would have signed an authorization for Dr. Duhart to release her husband's medical records, but counsel never asked her to do so (PCR Tr. II 28).

There were times when Cole saw his father passed out on the floor (PCR Tr. II 8-9).

David's parents, Elizabeth Cole and G.W. Rutledge, were alcoholics (PCR Tr. II 11-14). Elizabeth lived in Alabama, but she stayed with the Cole family in St. Louis when her drinking was out of control and the Alabama relatives could not handle her (PCR Tr. II 13). The Cole family regularly visited G.W. Rutledge in Alabama (PCR Tr. II 14). Rutledge was verbally abusive when he drank (PCR Tr. II 14). Several other family members also have drinking problems (PCR Tr. II 15).

Lillie's mother, Amy Henderson Lowe, and her brother, Leon Henderson, suffered from depression (PCR Tr. II 15-16). Amy Lowe became depressed after her husband's death and for about a year and a half stopped walking or caring for her children (PCR Tr. II 15-16). A friend of Amy's made sure that Lillie and her siblings were clothed and fed (PCR Tr. II 16). Leon Henderson had several unstable relationships and ultimately committed suicide (PCR Tr. II 16-17).

Lillie observed signs of depression in Cole during the week before the stabbings (PCR Tr. II 21-24). Cole was not his "normal happy self," and it appeared "like he was going to snap or going to have a nervous breakdown" (PCR Tr. II 21). Terri would not allow Cole to see his sons, and he was "terribly upset" and worried (PCR Tr. II 21, 24-25). Lillie was concerned that Cole might be suicidal, because he told her, "you're not going to see me any more. I just can't take what's going on" (PCR Tr. II 22, 24).

Lillie testified during the guilt and penalty phases, but her testimony did not include any of the information elicited at the post-conviction hearing (Tr. 1218-1242, 1596-1599).

This Court reviews the motion court's findings and conclusions for clear error. State v. Schaal, 806 S.W.2d 659, 667 (Mo. banc 1991). To establish that counsel was ineffective, Cole must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To establish prejudice, Cole must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Id. at 2068. Counsel must discover all reasonably available mitigating evidence. Wiggins v. Smith, 123 S.Ct. 2527, 2537 (2003).

The motion court denied relief, finding:

The reasonable investigation by trial counsel conducted in this case did not disclose any of the information alleged by Movant. This Court is unable to determine if this was due to lack of cooperation on the part of Movant and his family with trial counsel or whether the alternative information was only offered when the trial strategy did not result in a lesser sentence. To portray Movant and his family in such a poor manner to the jury as suggested by amended motion counsel would be inconsistent when Movant's defense at trial was

that he did not commit the murderous acts alleged. Trial counsel's strategy designed to convince the jury that they should rise above the horrible crime in this case and not execute a good man was reasonable and constituted sound trial strategy.

(PCR L.F. 472).

The motion court speculated that counsel's failure to call these witnesses was due to Cole and his family not cooperating with counsel (PCR L.F. 472). The court did not attempt to explain how a perceived lack of cooperation by Cole or his family had anything to do with counsel's failure to elicit from Dawson and Ruffino the testimony offered at the post-conviction hearing.

Counsel thought she interviewed Ruffino, although she could not recall what he said and her file did not contain any notes reflecting an interview of Ruffino (PCR Tr. 438-439). Ruffino testified that counsel never contacted him, but he would have been willing to speak to her (PCR Tr. 13). Ruffino would have been willing to testify at trial to the same information he provided in his post-conviction testimony (PCR Tr. 14).

Dawson said that counsel interviewed him on the telephone, but she did not question him about any of the topics he testified to at the post-conviction hearing (PCR Tr. 35-36, 39). Counsel did not ask Dawson about Cole's drinking or whether he seemed depressed (PCR Tr. 39). Dawson would have been willing to discuss with counsel and to testify at trial to all of the topics raised in his post-conviction testimony (PCR Tr. 36). When asked if she questioned Dawson about

anything other than the time he saw Cole on the night of the stabbings, counsel was evasive: “Well, I asked him if there was any information that he had in his personal possession that Andre might have said or someone might have said - - that would have been hearsay; I would have had to go further with it - - as far as the incident was concerned. **But anything else would not be relevant.**” (PCR Tr. 440)(emphasis added).

Lack of cooperation by Cole or his family had nothing to do with counsel’s failure to elicit this information from Dawson and Ruffino. Counsel did not thoroughly interview Dawson and Ruffino.

Counsel’s failure to interview Dr. Duhart also cannot be blamed on lack of cooperation. Dr. Duhart testified that defense counsel never contacted him (PCR Tr. II 61). Counsel testified that she knew the name of Cole’s doctor, but she did not attempt to obtain any of Cole’s medical records (PCR Tr. 441). Dr. Duhart would have been willing to speak with counsel, to provide her with the medical records, and to testify at trial (PCR Tr. II 61-62).

Counsel claimed that she asked Lillie about a family history for mental illness and alcoholism, “but there was no red flag put out by the family,” so she never asked the family for assistance in obtaining family medical records (PCR Tr. 426, 437-438). Lillie testified that counsel did not ask her any questions about her husband’s drinking, but that she would have been willing to discuss his drinking problem and willing to provide counsel with a release for David’s medical records (PCR Tr. II 25-26, 28). Lillie stated that counsel did not ask if she observed any



signs of depression in Andre around the time of the stabbings (PCR Tr. II 26). Counsel's failure to present this information cannot be blamed on lack of cooperation by Cole or his family.

The motion court also clearly erred in concluding that it would be inconsistent to portray Cole and his family in "such a poor manner" when Cole's defense was that "he did not commit the murderous acts alleged" (PCR L.F. 472). Acknowledging his alcohol abuse and his depression and the alcohol abuse and mood disorders of his various family members portrays neither Cole nor his family in a "poor manner." Counsel's purpose in penalty phase was to humanize Cole. Alcohol abuse and depression are common human responses to a failed marriage.

Evidence regarding Cole's emotional state at the time of the offenses would have given the jury an explanation as to why he threw the jack through Terri's patio door. Since the jury had already rejected Cole's claim that he did not kill Curtis or injure Terri, it would not have been unreasonable for counsel to attempt to explain why Cole was so distraught that night.

A similar factual situation arose in Cheshire v. State, 568 So.2d 908 (Fla. 1990). About six weeks after his wife left him, the defendant killed his wife and her new boyfriend. Id. at 910. He had threatened to kill her if she ever left him. Id. The defendant was particularly upset, because his son had begun calling the new boyfriend "daddy." Id. The defendant denied killing his wife. Id.

The Cheshire court reviewed the propriety of the trial court overriding the jury's recommendation of life imprisonment, which called for a determination of

whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment. Id. at 911-912.

If so, the trial court could not properly override the jury's recommendation. Id.

The Court wrote,

[A] reasonable juror could have relied upon this evidence to conclude that Cheshire lost control of himself because of intoxication, a perceived affront to his family status and the emotional distress that accompanies a failing marriage, and the fact that his spouse had left him for another person. Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court.

Id. at 911-912.

Evidence that Cole was extremely upset by the news that his children had a new daddy, that he was drinking more, that he was depressed to the point that he was behaving in a manner completely different from his usual demeanor, and that he spoke as if contemplating suicide, in combination with the evidence of his good character that counsel did present, would have provided the jury with a reason to impose a life sentence. This evidence would have supported submission of the extreme emotional distress statutory mitigating circumstance. But even if the court refused to submit the mitigating circumstance, the evidence still would have provided a persuasive basis for imposing a life sentence. This Court should

reverse the judgment of the motion court, vacate the death sentence, and impose a sentence of life without parole, or remand for a new penalty phase.

## **CONCLUSION**

Based on the argument presented in Point I, Cole asks this Court to reverse the judgment of the motion court and remand this case for a new trial, or in the alternative, remand for a new penalty phase. Based on the arguments presented in Points II, III, and IV, Cole asks this Court to reverse the judgment of the motion court, vacate the death sentence, and impose a sentence of life without parole, or remand for a new penalty phase.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Rebecca Kurz, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b).

The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 25,163 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on \_\_\_\_\_, 2004. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Ms. Deborah Daniels, Chief Counsel of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on the 26th day of July, 2004.

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Rebecca L. Kurz